No. 91-1594-CFX
Status: GRANTED

Title: Fred H. Edenfield, et al., Petitioners
v.
Scott Fane

Docketed:
March 30, 1992

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Thomson,Parker D.

Counsel for respondent: Vladek,David C., Hadeed,Albert J., Tunniciff,Charles

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Entry	Date	Note	Proceedings and Orders
1	Mar 30 1992	G	Petition for writ of certiorari filed.
2	Mar 30 1992		Appendix of petitioner filed.
3	Apr 20 1992		Brief of respondent Scott Fane in opposition filed.
4	May 6 1992		DISTRIBUTED. May 22, 1992
5	May 26 1992		Petition GRANTED.
			**********
7	Jul 1 1992		Order extending time to file brief of petitioner on the merits until July 24, 1992.
8	Jul 22 1992		Joint appendix filed.
9	Jul 22 1992		Brief of petitioners Fred Edenfield, et al. filed.
10	Jul 23 1992		Brief amicus curiae of Florida Institute of Certified Public Accountants filed.
12	Jul 31 1992		Order extending time to file brief of respondent on the merits until September 14, 1992.
13	Sep 14 1992		Brief of respondent Scott Fane filed.
14	Sep 14 1992		Brief amici curiae of American Advertising Federation, et al. filed.
15	Sep 14 1992		Brief amicus curiae of American Assn. of Attorney-Certified Public Accountants filed.
17	Oct 9 1992		Record filed.
		*	Certified proceedings U.S. Court of Appeals, 11th Circuit and U.S. District Court, N. Florida
16	Oct 13 1992		SET FOR ARUMENT MONDAY, DECEMBER 7, 1992. (2ND CASE).
18	Oct 15 1992		CIRCULATED.
19	Oct 16 1992	X	Reply brief of petitioners filed.
20	Dec 7 1992		ARGUED.

91-1594

(1)

Supreme Court, U.S.
FILED
MAR 30 1992
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No. _____

In The
Supreme Court of the United States
October Term, 1991

FRED H. EDENFIELD, *et al.*,
Petitioners,

v.

SCOTT FANE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state prohibition of direct, in-person, uninvited solicitation of potential clients by licensed Certified Public Accounts (CPAs), enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is a valid time, place and manner restriction of a CPA's First Amendment rights of commercial speech?

2. Whether the State of Florida's prohibition of direct, in-person, uninvited solicitation of potential clients by licensed Certified Public Accountants (CPAs), enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is an unconstitutional restriction of a CPA's First Amendment right of commercial speech?

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OPINIONS BELOW

The decision of the United States Court of Appeals, Eleventh Circuit, was rendered on October 30, 1991. *Fane v. Edenfield* is reported at 945 F.2d 1514, (11th Cir. 1991), and is reproduced herein in the Appendix, at p. A–1. A Suggestion for Rehearing En Banc was filed by Defendants-Appellants, and was denied on December 31, 1991. The Order is reproduced in the Appendix at p. A–20.

The Order from the United States District Court, Northern District of Florida, was entered on September 13, 1990, and is reproduced herein in the Appendix, at page A–4.

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals, Eleventh Circuit, was rendered on October 30, 1991. A timely Suggestion for Rehearing En Banc* was filed with the Court and was denied on December 31, 1991. This Petition for Writ of Certiorari is filed within 90 days of the Final Judgment. The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are at issue in the instant cause:

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* "A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel." *See* Rule 35-6, FRAP with 11th Circuit, *and also Missouri v. Jenkins,* 495 U.S. ____, 110 S.Ct. 1651,1662, 109 L.Ed.2d 31 (1990).

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 42 U.S.C. Section 1983:

> 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 460.413(1)(m), Florida Statutes (F.S.):

> 460.413 Grounds for disciplinary action; action by the board.-
>
> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> (m) Soliciting patients either personally or through an agent, unless such solicitation falls into a category of solicitations approved by rule of the board.

Section 473.301, F.S.:

> 473.301 Pupose.—The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

Section 473.323(1)(l), F.S.:

> 473.323 Disciplinary proceedings.—
>
> (1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:
>
> (l) Engaging in direct, in-person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the board.

Section 484.056(1)(t), F.S.:

> 484.056 Disciplinary Proceedings.—
>
> (1) The following acts relating to the practice of dispensing hearing aids shall be grounds for both disciplinary action against a hearing aid specialist as set forth in this section and cease and desist action by the department as set forth in s. 455.228 against any person owning or operating a hearing aid establishment who engages in, aids, or abets any such violation:

(t) Canvassing from house to house or by telephone either in person or by an agent for the purpose of selling a hearing aid, except that contacting persons who have evidenced an interest in hearing aids, or have been referred as in need of hearing aids, shall not be considered canvassing.

Rule 21A-24.002, Florida Administrative Code:

21A-24.002 Solicitation.

(1) A licensee may respond to any request for a proposal to provide public accounting services and may provide such services to those requesting same.

(2) A licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services: (a) if the communication would violate Rule 21A-24.001 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication.

(3) For purposes of this rule, the term "direct, in-person, uninvited solicitation" shall be deemed and construed to mean any communication which directly or implicitly requests an immediate oral response from the recipient. Uninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited. Indirect forms of solicitation such as giving speeches, conducting educational seminars, distributing professional literature by mail or other forms of delivery

that are not "in-person," writing books and articles, etc., are permitted.

(4) Any form of written communication to a potential client, invited or not, is permissible under this rule provided such communication conforms to the advertising guidelines of Rule 21A-24.001.

STATEMENT OF THE CASE

The 42 U.S.C. § 1983 Complaint was initially filed in the Gainesville District of the United States District Court for the Northern District of Florida by Respondent, Scott Fane, (Fane) a Certified Public Accountant (CPA) in the State of Florida, who alleged that he wished to engage in direct, in-person, uninvited solicitation of potential clients for his public accounting practice and was prohibited from doing so in violation of his constitutional rights.

After stipulation by the parties, the Complaint was transferred to the Tallahassee Division of the U.S. District Court for the Northern District of Florida, and the named defendants were modified to constitute the members of the Florida Board of Public Accountancy in their official capacities.

Petitioner, Fred Edenfield, et al., (Board) answered the Complaint on October 6, 1988, and subsequent thereto on December 8, 1988, Fane moved for Summary Judgment with affidavit. The Board responded to Fane's Motion on January 4, 1989 with affidavit. Fane replied with a supplementary affidavit on January 27, 1989.

After hearing oral argument, the District Court, on September 13, 1990, granted Fane's Motion for Summary Judgment and entered its Order enjoining the Board from enforcing the provisions of Rule 21A-24.002(2),(3), Florida

Administrative Code (F.A.C.), (enacted pursuant to 473.323(1)(l) F.S.) as they apply to CPAs who seek clients through direct, in-person, uninvited solicitation in the business context.

On October 11, 1990, the Board appealed that decision to the Eleventh Circuit Court of Appeals. On October 30, 1991, the Circuit Court entered an opinion, (*Fane v. Edenfield,* 945 F.2d 1514 (11th Cir. 1991). The Board filed a timely Suggestion of Rehearing En Banc which was denied on December 31, 1991. This Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

Fane, as a certified public accountant (CPA) licensed to practice in Florida, was attempting to increase his public accounting practice in the State through direct, in-person, uninvited solicitation, either in person or over the telephone, which actions are prohibited by Rule 21A-24.002, F.A.C. Fane asserted that such activities were commonplace in other states, that he had observed no injury to the profession or the public's perception of the profession in other states where such activities are permitted. He believes CPAs would not be likely to attempt to improperly influence potential clients through solicitation, and that, in any event, the various disciplinary provisions of Florida Statutes and Rules governing public accounting as well as applicable criminal penalties would deter any CPA from engaging in collusion or fraud with a potential client.

The Board presented evidence which stated that the need for regulation of public accountancy in Florida and other states arose from the important public need to protect the integrity of CPAs' opinions on financial statements. As a necessary corollary to this need to protect the integrity and objectivity of the independent attest function, all activities

of CPAs, in their practice as CPAs, are bound up with the rendering of opinions on financial statements.

In recognition of the need to protect not only the actual relationship of independence and objectivity of CPAs vis-a-vis their clients, but also, and most importantly, to protect the public and its perception of the CPA's total independence and objectivity, the Board stated that direct, in-person, uninvited solicitation would be inappropriate as a method by which CPAs should become engaged to perform services for clients. The Board's evidence argued that the ban on direct, in-person, uninvited solicitation is for the protection of users of CPA's opinions on financial statements as well as to protect clients from CPAs engaging in harassment and undue influence.

REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED INSOFAR AS THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS ERRONEOUSLY APPLIED AND INTERPRETED THIS COURT'S TESTS TO BE USED WHEN REVIEWING APPROPRIATE TIME, PLACE AND MANNER REGULATIONS[1] ON COMMERCIAL SPEECH OF A REGULATED PROFESSION.

The Circuit Court of Appeals, by holding that the rule prohibiting direct, in-person, uninvited solicitation by regulated professionals must be analyzed as a full-fledged

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1 Rule 21A-24.002, Florida Administrative Code (F.A.C.).

content-based restriction on commercial speech, using the test set forth by this Court in *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York.*, ___ U.S. ___, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), has effectively foreclosed the legitimate ability of states to regulate certain forms of client seeking in order to protect the public from the secondary effects of such activities.

This Court has noted on several occasions that states' interests in regulating learned professions, such as certified public accountancy, are extremely important and entitled to great deference, even when under constitutional scrutiny, *see Douglas v. Noble,* 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590 (1923), and *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Notwithstanding this fact, the panel majority of the circuit court ignored a vital purpose for the enactment of the regulation at issue, i.e., the protection of the general public's trust in the independence and objectivity of CPAs (whose primary purpose for existence as a regulated profession is to both act as and be perceived as independent analyzers, arbiters and judges of the truth or falsity of a business entity's financial statements) and instead has focused on the impact of the rule on CPAs who wish to solicit.[2]

The standard for reviewing a regulation impacting protected speech and determining whether such a regulation can be sustained through a time, place and manner analysis has been fully articulated by this Court most recently in *Barnes v. Glen Theater, Inc.,* ___ U.S. ___, 111 S.Ct. 2456,

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2 This Court has itself recognized the vital importance of CPAs as impartial, independent arbiters in the financial life of the country. *See United States v. Arthur Young & Co.,* 465 U.S. 805,811-821, 104 S.Ct. 1495,1499-1504, 79 L.Ed.2d 826 (1984). Included in such analysis was this Court's observation that not only must CPAs *be* independent, they must be *perceived* to be independent, not only by their clients, but by the public as a whole. Id. at 465 U.S. 819 Ftn 15, 104 S.Ct. 1503-1504.

115 L.Ed.2d 504 (1991), wherein the plurality held[3] that the test to be used is essentially that set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). In *O'Brien,* this Court stated:

> "[W]e think it clear that a government regulation is sufficiently justified [as a valid time, place and manner restriction] if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to this suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* 391 U.S. at 376-377, 88 S.Ct. at 1678-79 [Footnote omitted].

There appears little or no question that the rule at issue in the instant cause is within the constitutional power of the state as a legitimate exercise of the police power.[4] The rule likewise furthers substantial governmental interests. The state strongly asserted, through the affidavit of Louis Dooner, CPA, that the vital importance of regulating CPAs in their activities not only in order to protect the public from dishonest CPAs, but also to preserve the public's perception of the independence and objectivity of the profession, must be accepted without serious disagreement, *see U.S. v. Arthur Young, & Co., supra, Mercer v. Hemmings,* 170 So.2d 33 (Fla. 1964). Moreover, as this matter was decided against the state on a motion for Summary Judgment, all evidence must be reviewed in the light most favorable to the State with all

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3 *Barnes v. Glen Theatre, supra,* at 111 S.Ct. 2460-61.

4 *See Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

facts and reasonable doubts being resolved in the State's favor. *See United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

While the regulation at issue does not set forth its ultimate purpose within its own text, it is apparent that the rule is part of an overall state regulatory scheme relating to CPAs[5] — a scheme which includes, as a primary purpose, the protection of the independence of CPAs as well as the public's perception of CPAs as being neutral and uninterested when engaging in the attest function and independently opining upon the financial statements of their clients.

Turning to the third prong of the *O'Brien* test, this Court has held that a regulation may be "content neutral" if the regulation is *justified* without reference to the content of regulated speech, *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,771, 96 S.Ct. 1817,1830, 48 L.Ed.2d 346 (1976), *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41,48-54, 106 S.Ct. 925,929-933, 89 L.Ed.2d 29 (1986). Florida's rule prohibiting direct, in-person, uninvited solicitation, contrary to the finding of the Circuit Court of Appeals, is clearly justified, not by its relation to the content of the speech made by CPAs when engaged in the prohibited form of solicitation, but rather on the manner by which the CPAs are seeking particular potential clients. As was argued to the Circuit Court of Appeals,[6] it is the manner by which CPAs pursue such inherently unregulatable solicitation contacts which forms the basis of the state's concern, and is the reason for the rule prohibiting this manner of client procurement. The state, as noted above, is concerned primarily with protecting not only

5 *Cf.* Chapters 455,473, F.S.

6 *See Fane, supra*, at 945 F.2d 1514,1519, Appendix at p. A-1.

the *actual* independence of CPAs, but also the *perception* of their independence by the general public.[7] This perception can only be maintained by making certain that the public is aware that CPAs are not engaging in the type of inherently unregulatable solicitation which this Court has rightly held may be prohibited.[8] Thus, since the state is concerned with the secondary impact of CPAs soliciting potential clients,[9] the Circuit Court of Appeals' finding that the regulation in question is not content neutral and cannot be justified as a time, place and manner regulation of the type of communications being offered by CPAs is clearly erroneous. This Court must issue the Writ to correct the decision of the Eleventh Circuit Court of Appeals.[10]

Finally, it is apparent that a regulation which prohibits direct, in-person, uninvited solicitation of potential clients, while leaving open all other forms of advertising and solicitation which are not inherently false, fraudulent,

7 *United States v. Arthur Young, supra*, at 465 U.S. 819, 104 S.Ct. 1503-1504.

8 *See Ohralik, supra*, at 436 U.S. 457-458, 98 S.Ct. 1919.

9 Secondary impacts which may well involve undue harassment of potential clients or fraudulent activities on the part of CPAs and their clients, *cf. Ohralik, supra*, at 436 U.S. 464, 98 S.Ct. 1923.

10 As is noted above, the statutes and rule in question in the instant case are silent as to the motivating factors surrounding the legislature's and the regulating authority's purposes in enacting the prohibition. It is axiomatic, however, that statutes and rules are presumed to be enacted only for valid reasons. In addition, the legislature of the State of Florida has found, in enacting its statute regulating CPAs, that a major purpose of the statute is to protect "the public need for independent and objective public accountants..." in order to "...assure the accuracy of audit statements upon which the public relies..." (Section 473.301, F.S.). Thus, it is apparent that the regulation must be related directly to this valid state concern. Given that this is the predominant concern of the legislature and the Board of Accountancy, then any other potential motivating factors are not relevant to the justification for the rule in question, *see City of Renton, supra*, at 475 U.S. 47-48, 106 S.Ct. 929.

deceptive or misleading, more than adequately retains other options for CPAs to get their commercial messages across to potential clients. In addition, as this Court has already stated in *Ohralik, supra,* only by prohibiting direct, in-person, uninvited solicitation can such contacts be regulated. Therefore, it is apparent that after balancing the numerous other methods of commercial soliciting available to CPAs with the limited prohibition relating to direct, in-person, uninvited solicitation, the challenged rule and statutes meet the fourth prong of the *O'Brien* test.[11] The rule is thus narrowly tailored so as to meet First Amendment strictures, *Barnes v. Glen Theaters, Inc., supra,* ___ U.S. ___, 111 S.Ct. at 2463.

In short therefore, this Court should grant the Petition for Writ of Certiorari in order to review the decision of the Eleventh Circuit Court of Appeals which misapplies this Court's articulated time, place and manner analysis on content neutral regulations restricting commercial speech. In light of this Court's long-standing predisposition to give great respect to rules and statutes of the various states regulating learned professions, the decision of the Eleventh Circuit Court of Appeals striking down the instant rule through an inherently flawed analysis of this Court's prior precedents, must be reviewed and corrected so as to reinstate such limited time, place and manner restrictions as those at issue herein.

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11 Requiring that the restriction on alleged First Amendment freedoms may not be greater than that which is essential to the accomplishment of the asserted interest.

II

THIS COURT SHOULD GRANT THIS PETITION FOR WRIT OF CERTIORARI AS THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION IS CONTRARY TO PRECEDENTS OF THIS COURT RELATING TO REGULATION OF COMMERCIAL SPEECH WHICH ESTABLISH THAT A STATE MAY PROHIBIT DIRECT IN-PERSON, UNINVITED SOLICITATION FOR REMUNERATIVE EMPLOYMENT.

The Circuit Court of Appeals erred in determining that Florida's prohibition did not further the State's interest and that the prohibition was not narrowly tailored to that interest. The court also erred in limiting a state's ability to regulate direct, in-person, uninvited solicitation to those professions involving a "trained advocate," or to the solicitation of the "emotionally vulnerable."[12]

In *Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc., supra,* this Court, for the first time, held that commercial speech was entitled to protection under the First Amendment of the U.S. Constitution. "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information.... It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed." *Id.* at 425 U.S. 765, 96 S.Ct. 1827.

The protection afforded commercial speech, however, must be balanced against a state's interest in maintaining

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12 The Eleventh Circuit Court of Appeals' decision is also contrary to a Florida Fourth District Court of Appeal's decision issued immediately before this decision, declaring the same prohibition constitutional. *See State Dept. of Professional Regulation, Board of Accountancy v. Rampell,* 589 So.2d 1352 (Fla. 4th DCA 1991), *appeal docketed,* no. 79,371. (Supreme Court of Florida. Feb. 17, 1992).

the standards of its professions and in protecting its consumers. In *Ohralik v. Ohio State Bar Ass'n, supra,* this Court, in a unanimous opinion, determined that a state could prohibit the direct, in-person, uninvited solicitation by an attorney where the goal for that solicitation was pecuniary gain. *Id.* at 436 U.S. 457, 458, 98 S.Ct. 1919.[13] Special problems, not present with other types of advertising, appear with direct, in-person, uninvited solicitation:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual....In-person solicitation is as likely as not to discourage persons...from engaging in a critical comparison of the "availability, nature, and prices"....[I]t actually may disserve the individual and societal interest, ...in facilitating "informed and reliable decision-making."

Ohralik, supra at 436 U.S. 457, 458, 98 S.Ct. 1919.

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13 The attorney had been suspended after offering, for a fee, his services to accident victims immediately after their accident. *Cf. In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) (declared unconstitutional, a disciplinary rule prohibiting attorney solicitation where the attorney used the mail to inform prospective clients that free legal assistance was available from the American Civil Liberties Union).

The premise for these conclusions is that direct, in-person, uninvited solicitation is "*inherently* conducive to overreaching and other forms of misconduct," and that a complete prohibition of such is the only effective manner of regulating such misconduct. *Id.* 436 U.S. at 464.[14] Accordingly, given the State's compelling interest in preventing fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct," this Court held that, for the *limited instance* of direct, in-person, uninvited solicitation, a state may enact an outright, prophylactic ban of such communication. *Id.* 436 U.S. at at 462, 464. Similarly, for the limited instance of direct, in-person, uninvited solicitation, the state may enact such a prohibition without proof of *actual* harm to prospective clients; rather, the state may prohibit such solicitation on the basis of the *potential* for overreaching. *Ohralik* at 436 U.S. 466, 467, 98 S.Ct. 1923, 1924. *See also Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 472 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988)(same); and *In re Primus, supra,* (showing of potential danger is sufficient).

This Court refined the analysis employed for commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra,* where a four-prong test was articulated for determining the constitutionality of governmental restrictions on commercial speech. That test requires that, first, the speech at issue must concern a lawful activity and not be misleading; second, the regulation must serve a substantial governmental interest; third, the regulation must directly further the asserted interest; and finally, the regulation must be no more extensive than necessary to achieve the state's interest. *Id.* 447 U.S. at 566.

In *Shapero v. Kentucky Bar Ass'n, supra,* this Court again discussed the abuses inherent in direct, in-person, uninvited

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14 A report from the Federal Trade Commission found abuses to be *inherent* in face-to-face selling. *Ohralik,* at 436 U.S. 464, 98 S.Ct. 1922, 1923.

solicitation, rejecting the assertion that direct-mail solicitation presented the same potential for abuse as in-person solicitation: "face-to-face solicitation [is] a 'practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud,' " and "unique...difficulties...would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban." *Id.* at 486 U.S. 475, 108 S.Ct. 1922. Direct-mail solicitation suffers from neither of these inherent problems and, by contrast, facilitates the societal interest in informed and reliable decision-making. *Id. See also Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 641 105 S.Ct. 2265, 2276, 85 L.Ed.2d 652 (1985).

In applying the *Central Hudson* test, the Eleventh Circuit Court of Appeals found that the prohibition met the first and second prong of the test,[15] but that it failed the third and fourth prongs as the prohibition failed to further the state's interest and was more extensive than necessary. This finding was based, in part, on an incorrect reading of this Court's decisions that a state's ability to prohibit direct, in-person, uninvited solicitation is limited to those professions involving "trained advocates," such as attorneys, or to the solicitation of "the emotionally vulnerable." *Fane,* 945 F.2d at 1520, Appendix at A–13. Yet, nothing in this Court's decisions suggests that those decisions should be read so narrowly. Indeed, *Shapero* specifically rejected the proposition that emotional vulnerability provides the predicate for imposition of a prohibition on solicitation. "The relevant inquiry is not whether there exists potential clients whose 'condition' makes them susceptible to undue influence, but whether the

15 Included in the Eleventh Circuit Court of Appeals' finding was a specific finding with respect to the second prong that "Florida's interest in regulating the accounting profession is substantial." *Fane,* 945 F.2d at 1518, n.7, Appendix at A–8.

mode of communication poses a serious danger that lawyers will exploit any such susceptible belief." 486 U.S. at 474.

The predicate for the imposition of a prohibition on direct, in-person, uninvited solicitation is the special responsibility a state bears for ensuring that its consumers are protected from fraud, overreaching, undue influence, and invasion of privacy and for maintaining standards among members of its licensed professions. *Ohralik,* 136 U.S. at 457, 458. This responsibility extends not only to the legal profession, as noted in *Ohralik* and *Shapero,* but to other professions regulated by a State:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572, 588 (1975). *See also Ohralik, supra* (state bears special responsibility for maintaining standards among its professions). The rationale for this Court's decisions reaches professions who have, or are perceived to have, knowledge beyond that of the solicited client. In such an instance, the client is almost always at a disadvantage and the danger lies with the professional using his specialized knowledge to prey on the client's relative lack of knowledge.

Immediately before the Circuit Court of Appeals issued its decision in this matter, the Fourth District Court of Appeal

in *Rampell, supra,* had before it the same prohibition and declared it constitutional. In accord with *Ohralik,* the Fourth District found that the State has a legitimate interest in regulating in-person solicitation based on the inherently coercive nature of such communications and based on a CPA's superior knowledge of taxes and financial statements. *Rampell* at 1356, 1357. In his dissent in this matter, Judge Edmondson noted:

> But this quoted language [trained advocates] was not at the heart of *Ohralik's* reasoning. I think Ohralik's reasoning reaches professionals other than lawyers.... In-person solicitation is potentially harmful chiefly because lawyers, as professionals, have (and are perceived by lay people to have) specialized knowledge beyond that of their solicited clients.... The client, when compared to the professional is almost always unsophisticated when it comes to the subject of the professional's work. The danger lies with the lawyer who intimidates or baits the potential client with the lawyer's specialized knowledge while simultaneously preying on the client's relative ignorance.

CPAs also have (and are perceived to have) knowledge beyond that of the potential clients which CPAs could well use to entice or to intimidate clients. For example, CPAs provide tax advisory services and financial management services to clients, when many of these prospective clients may be ignorant of their potential rights and their potential liabilities. To think that clients

> may be as vulnerable to a seemingly knowledgeable CPA as accident victims are to an ambulance chasing attorney is not unreasonable....

Fane, 945 F.2d at 1521, Appendix at A–15, 16.

Undeniably, this reasoning applies to the accounting profession and the services that profession provides to consumers. Florida has long subjected accountancy to regulation pursuant to its police powers. Like the practice of law, the practice of accountancy is a highly skilled and technical profession, in which years of education and training are required. Both professions must struggle with an intricate system of statutes and regulations. The potential for confusion as to the nature or need for such services by laymen is as great for accounting services as it is for legal services.

Additionally, only CPAs may provide attest services. Attest services refer to the process by which a CPA scrutinizes financial statements prepared by an entity and expresses an opinion as to whether the entity's financial position and results of operation are fairly presented in accordance with generally accepted accounting principles. Such an opinion may only be issued by a licensed CPA, and its issuance is subject to state regulation and rules. *See Florida Accountants Ass'n v. Dandelake,* 98 So.2d 323 (Fla. 1957).

Unlike an attorney whose duty it is to present his client's case in the most favorable light:

> An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. The independent public accountant performing this special

> function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.

United States v. Arthur Young & Co., supra, at 465 U.S. 817, 818, 104 S.Ct. 1502, 1503. If necessary, a CPA is required to take positions adverse to his client's interest. Yet, it is this independence and integrity by CPAs in providing attest services that make attest services so valuable to commerce within the State of Florida.

Perhaps unlike any other service, the provision of attest services serves a critical link in our free-market economy. Creditors, stockholders, investors, and others rely upon opinions of CPAs for assurance regarding the financial information of others. Independent certification assists in ensuring that financial statements contain financial information which is fairly presented in accordance with generally accepted accounting principles. Such fairly presented financial information is essential, in a free-market economy, in order to allocate economic resources efficiently. *See Rampell, supra,* at 1356. This Court recently recognized, it is not only the fact, but also the appearance of independence and accuracy by CPAs in their attest capacity, which is so essential to commerce. *United States v. Arthur Young,* 465 U.S. at 819-20, n.15, 104 S.Ct. 1504. Without this appearance and reassurance, creditors and others would have little confidence in an entity's financial statements. Thus, the CPA acts as a balance between management's interests and the public's need for objective, accurate disclosure of financial information.

This balance, however, could be upset, or appear to be upset, if CPAs were permitted to engage in direct, in-person,

uninvited solicitation of clients. It is not difficult to imagine a situation by which a client could be solicited and tempted to switch CPAs based on the selection of certain alternative accounting treatments. The affidavit of Louis W. Dooner (reproduced herein at p. A–21), submitted to the District Court, and reviewed by the Eleventh Circuit, states in part:

> The only type of solicitation that a CPA may not engage is that that places the potential client in the position of having to make an immediate oral response thus opening the door to overreaching and vexatious conduct by the CPA or conversely, and far more damaging to society, the opportunity for the potential client to place the soliciting CPA in a compromising position as part of the bargain reached since the CPA is obviously in need of business and may be willing to bend the rules. Such activity is not in the best interest of the public which is so dependent on independent opinions on financial statements based on an audit conducted in accordance with generally accepted auditing standards. [*Id.* at p. A–27]

Indeed, Respondent acknowledged this potential for abuse in his Supplemental Affidavit (at p. A–31), where he admits that financial pressures might force a company to seek "to bend the rules" in order to obtain a " 'clean' financial opinion." Although Respondent professes that he would never participate in such, the State has a legitimate, real-world concern that others will.[16] Under this Court's

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16 The issue is of sufficient magnitude that the Securities and Exchange Commission has expressed grave concerns about "opinion shopping" and has stepped up enforcement activities against its improper use. *See, e.g.,* Martin, *An Effort to Deter Opinion Shopping,* 14 J. Corp. Law 419, 430-31 (1980); May, *Accountants and The SEC: How to Avoid the Appearance of "Opinion Shopping",* 15 Sec. Reg. L.J. 154 (1987).

precedents of *Ohralik, Shapero,* and *In re Primus,* the state need only show *potential* for abuse in order to justify its prohibition, and not *actual* harm, as required for other forms of commercial speech. *See Ohralik* at 436 U.S. 466, 467, 98 S.Ct. 1923, 1924; *Shapero* at 486 U.S. 472. The State has met this burden.

There is simply no doubt that the State's interest in ensuring that the services provided by CPAs are performed in a manner in which creditors and others in the State will have confidence, is paramount. The State has a legitimate interest in the regulation at issue for it to pass scrutiny under decisions of this Court, and it cannot be doubted that the State, by enacting a prophylactic ban, has acted in a very direct and causal manner to prevent these evils and to maintain the professional standards of CPAs in the State. The Eleventh Circuit therefore erred in its decision and in restricting the holding of this Court's decisions to solicitation by "trained advocates" or of the "emotionally vulnerable."

The Circuit Court of Appeals' decision is also in direct conflict with this Court's precedents as to the fourth prong of the test, i.e, that the regulation be no more extensive than necessary to achieve the state's interest. The court erred in holding that the prohibition on direct, in-person, uninvited solicitation "could be served equally well by existing regulations imposed on the accounting profession or by a more limited restriction of the protected speech." *Fane,* 945 F.2d at 1520, Appendix at A–10, 11. In *Ohralik,* the Court specifically recognized that because of the "inherently coercive" nature of direct, in-person, uninvited solicitation, no other effective regulation exists except an outright, prophylactic ban:

> If appellant's views were sustained, in-person solicitation would be virtually immune to effective oversight and regulation by the state or by the legal profession, in contravention of the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner. It therefore is not unreasonable, or violative of the Constitution, for a State to respond with what in effect is a prophylactic rule.

Id. at 436 U.S. 466, 467, 98 S.Ct. 1924. *See also Shapero,* 436 U.S. at 473 (The "unique" regulatory problems of direct, in-person, uninvited solicitation justify a complete ban). Although the Eleventh Circuit Court of Appeals asserts the prohibition is too broad as it covers activities besides attest services, the prohibition is no broader than that approved in *Ohralik* as being necessary to maintain the professional standards of all attorneys, not just personal injury attorneys. The State has recognized that direct, in-person, uninvited solicitation is inherently unregulatable and that it must be prohibited in order to protect the standards of the profession and the public. As such, the Circuit Court of Appeals' decision is in conflict with Supreme Court precedents.[17]

Contrary to the 11th Circuit Court of Appeals' decision, there are no alternatives or less restrictive means of regulating the conduct at issue. The regulations cited by the Circuit Court of Appeals can only be utilized on an after-the-fact basis, based upon *subsequent* discovery of the misconduct. The State, by this regulation, is attempting to provide an effective and objective mechanism before misconduct occurs. The State has a compelling interest in such regulation, which interest permits the State to apply, as *Ohralik* found, remedies before the fact. To have dealt with this situation

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17 The Fourth District Court of Appeal found in *Rampell, supra,* in accord with *Ohralik,* that, because direct, in-person, uninvited solicitation is nearly impossible to police, the State's decision to enact a prophylactic ban on such communication constitutes a "reasonable fit" between the regulation and the substantial state interest served. *Rampell, supra,* at 1357.

in another manner, would have required an army of investigators, and yet, in the end, would still not have been as effective as an outright prohibition. No effective pre-screening mechanism, such as that approved in *Zauderer* for advertising, is available to prevent the problems associated with direct, in-person, uninvited solicitation. Accordingly, the alternatives proposed by the lower court fail *Central Hudson's* requirement that the State's interest "be served *as well* by a more limited restriction." *Id.* 447 U.S. at 564 (emphasis supplied). As such, the regulation passes the fourth prong of *Central Hudson* and should be declared constitutional.

If allowed to stand, the Eleventh Circuit Court of Appeals' decision will substantially curtail this Court's decisions permitting states to regulate professions and protect consumers. The Eleventh Circuit's decision will limit *Ohralik* and other decisions of this Court to being applicable only to attorneys and the emotionally vulnerable, eviscerating a state's ability to regulate in any manner the commercial speech of other professions. The State of Florida has enacted similar prohibitions as to other professions. *See, e.g.*, § 460.413(1)(m), Fla. Stat. (solicitation by chiropractors prohibited); § 484.056(1)(t), Fla. Stat. (solicitation of optical devices and hearing aids prohibited). The Eleventh Circuit's decision presents a question of exceptional importance to the State of Florida, the professions which it regulates, and the consumers protected by such regulations.

CONCLUSION

For the above-stated reasons, this Petition for Writ of Certiorari should be granted, and the Court should allow Petitioners to file their brief stating comprehensively why the decision of the Eleventh Circuit Court of Appeals conflicts with several of the decisions of this Court permitting states to prohibit direct, in-person, uninvited solicition.

Respectfully Submitted,

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No. _____

In The
Supreme Court of the United States
October Term, 1991

FRED H. EDENFIELD, et al.,

Petitioners,

v.

SCOTT FANE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX

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FANE v. EDENFIELD

Scott FANE, Plaintiff-Appellee,

v.

Fred H. EDENFIELD, Jr., Richard J. Aboud, Whipple Van Ness Jones, Jr., Margaret F. Struope, Dean F. Denison, William R. Martin, Joseph R. Millsaps, Antonio L. Argis, Jerome A. Schine, in their official capacities as members, Board of Accountancy, Defendants-Appellants.

No. 90-3943.

United States Court of Appeals, Eleventh Circuit.

Oct. 30, 1991.

Certified public accountant (CPA) brought action challenging Florida ban on in-person solicitation by CPAs. The United States District Court for the Northern District of Florida, No. TCA 88- 40264/MMP, Maurice Mitchell Paul, J., granted summary judgment in favor of CPA and Florida Board of Accountancy appealed. The Court of Appeals, Dubina, Circuit Judge, held that ban was impermissible restriction of commercial speech in violation of First Amendment.

Affirmed.

Edmondson, Circuit Judge, filed dissenting opinion.

1. Federal Courts - 754

Conclusions of law rendered upon summary judgment are subject to same standard of appellate review as any question of law brought on appeal.

2. Constitutional Law - 90.2

Florida statute prohibiting certified public accountants (CPAs) from engaging in in-person solicitation was impermissible restriction of commercial speech in violation of First Amendment because statute did not directly advance state's asserted interest in protecting CPA's integrity, independence and objectivity while performing the attest function, and justification offered for ban could be served equally well by existing regulations imposed on accounting profession or by more limited restriction of protected speech. U.S.C.A. Const. Amend. 1; West's F.S.A. § 473.323(1)(l).

3. Constitutional Law 90.2

Blanket prohibitions on commercial speech are disfavored, and mere possibility that isolated abuses or mistakes may occur does not justify total ban on certain mode of protected commercial speech. U.S.C.A. Const. Amend. 1.

4. Constitutional Law - 90.2

State restricting commercial speech is not required to employ least restrictive means to accomplish its ends, but must utilize means narrowly tailored to achieve desired objective. U.S.C.A. Const. Amend. 1.

5. Constitutional Law - 9O.2

State restricting commercial speech bears burden of justifying its restrictions. U.S.C.A. Const. Amend. 1.

6. Constitutional Law - 90.2

Prophylactic restraints on commercial speech based on unsupported assertions or unsubstantiated fears are not acceptable. U.S.C.A. Const. Amend. 1.

7. Constitutional Law - 90(1)

If state can combat wrongdoing by direct means, it cannot use its interest in foreclosing harm to justify broad-scale restraints on speech. U.S.C.A. Const. Amend. 1.

8. Constitutional Law - 90(3)

Constitutionally permissible time, place and manner restriction must not be based upon content of speech. U.S.C.A. Const. Amend. 1.

9. Federal Courts - 611, 612

Court of Appeals has discretion to consider argument first made on appeal, and may exercise that discretion if omitted issue involves pure question of law and if refusal to consider it would result in miscarriage of justice.

10. Federal Courts - 612

Court of Appeals' consideration of legal arguments not presented to district court is especially appropriate on appeal from summary judgment.

Appeal from the United States District Court for the Northern District of Florida.

Before EDMONDSON and DUBINA,Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

DUBINA, Circuit Judge:

The appellants, all of whom are members of the Florida Board of Accountancy ("the Board"), appeal the district court's grant of summary judgment in favor of the appellee, Scott Fane ("Fane"). For the reasons which follow, we affirm the district court's grant of summary judgment.

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* Honorable Jesse E. Eschbach. Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

I. FACTUAL BACKGROUND

Fane is a certified public accountant ("CPA") who is certified in New Jersey and Florida. In the mid-1980's, he moved to Florida to set up an accounting practice, and sought to solicit business via in-person contacts with businesses he felt would be interested in his services. Fane was not able to implement his planned solicitation, however, because in-person solicitation by CPAs is forbidden in Florida.[1] The ban only applies to CPAs. Other financial professionals, such as non-certified accountants, bookkeepers, and tax preparers, are not prohibited from utilizing personal contacts to solicit new clients.

Only three other states, i.e., Georgia,[2] Texas,[3] and Louisiana, prohibit in-person solicitation by CPAs. In addition, the accounting boards of twelve other states prohibit in-person solicitation, although the validity of such a prohibition by competing accountants without legislative authorization has been questioned under the antitrust laws. R1-18-1, Exh. D (letter from Anthony Low Joseph, Bureau of Competition, Federal Trade Commission, to Eleanor Weinstock, Florida State Senator (Apr. 28, 1987), comparing Florida's statutory regulation of CPAs' solicitation to its regulation of other professions and the regulation of

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1 Pursuant to Fla.Stat.Ann. § 473.323(1)(1) (West 1991). A CPA's engaging in "direct, in person. uninvited solicitation of a specific potential client" constitutes grounds for disciplinary action. Fla.Admin.Code Ann. r. 21A-24.002(3) (1991) defines a prohibited solicitation as "any communication which directly or implicitly requests an immediate oral response from the recipient." The regulation specifically states that "[u]ninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited."

2 O.C.G.A. § 43-3-35(i) (1988).

3 Tex.Rev.Civ.Stat.Ann. art. 41a-1. § 6(a)(2) (West 1991).

accountants in other states). *See also* Rhode Island Board of Accountancy, 107 F.T.C. 293 (1986).

Fane instituted this lawsuit in an effort to have Florida's prohibition of in-person solicitation by CPAs declared unconstitutional. The Board disputed any constitutional violation created by the proscription. The district court granted Fane's motion for summary judgment and enjoined the Board from enforcing the ban on in-person solicitation by CPAs in Florida. The Board then perfected its appeal to this court.

II. DISCUSSION

[1] The only issue raised by the Board that we need to address is whether the district court correctly determined that Florida's prohibition on in-person solicitation by GPAs is unconstitutional.[4] We review the district court's order granting summary judgment de novo. *Akins v. Snow,* 922 F.2d 1558, 1560(11th Cir.), *cert. denied,* U.S. 320, 111 S.Ct. 2915, 115 L.Ed.2d 1079 (1991). Conclusions of law rendered upon summary judgment are subject to the same standard of appellate review as any question of law brought on appeal. *Morrison v. Washington County, Alabama,* 700 F.2d 678, 682 (11th Cir.), *cert. denied,* 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983), *holding mod. on other grounds, Helicopter Support Systems, Inc. v. Hughes Helicopter Inc.,* 818 F.2d 1530 (11th Cir.1987) (citations omitted).

[2] Fane contends that Florida's prohibition against in-person solicitation by CPAs is an unconstitutional restriction of commercial speech because the restraint does not

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4 The Board also argues that the district court erred by granting summary judgment in this case. Since we do not find any material factual disputes which would require resolution at trial, we see no merit to that argument. We will, therefore, address only the question of law decided by the district court.

further the state's interest in regulating the accounting profession, nor is it narrowly tailored to that end. Fane also maintains that the imposition of the ban upon CPAs, but not on other accounting professionals who perform the same tasks, is a violation of equal protection. The Board argues that the ban is necessary to protect a CPA's integrity, independence, and objectivity while performing the attest function.[5] The Board also argues that the ban is a permissible time, place, and manner restriction that is content neutral.

Commercial speech, i.e., expression that is related exclusively to the economic interests of the speaker and audience, is undeniably entitled to substantial protection under the First and Fourteenth Amendments of the United States Constitution.[6] *Peel v. Attorney Registration and Disciplinary Comm'n,* ___ U.S ___, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990); *Board of Trustees of State University of New York v. Fox,* 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626,105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341(1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The informational function of advertising forms the basis for the First Amendment's concern for commercial speech. *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 783, 98 S.Ct. 1407,

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5 The attest function is the issuance of an independent opinion regarding a client's financial stability based on an audit or review of a clients financial statements. Only CPAs perform the attest function.

6 The First Amendment, as applied to the states by the Fourteenth Amendment, protects commercial speech from unjustified governmental regulation. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341(1980).

1419, 55 L.Ed.2d 707 (1978). Commercial speech furthers the economic interests of the speaker while also assisting the consumer audience. *Central Hudson,* 447 U.S, at 561-62, 100 S.Ct. at 2348-49. The importance of the dissemination of commercial information is its benefit to consumers and society. *Virginia State Board of Pharmacy,* 425 U.S. at 764-65, 96 S.Ct. at 1827.

[3] Blanket prohibitions on commercial speech are disfavored. *Shapero,* 486 U.S. at 476, 108 S.Ct. at 1923. The mere possibility that isolated abuses or mistakes may occur does not justify a total ban on a certain mode of protected commercial speech. *Id.* Any restriction of commercial speech requires "the government goal to be substantial, and the cost to be carefully calculated." *Fox,* 492 U.S. at 480, 109 S.Ct. at 3035. For example, the government may ban commercial speech that is more likely to deceive the public than to inform it, *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 464-65, 98 S.Ct. 1912, 1922-23, 56 L.Ed.2d 444 (1978), or commercial speech that is related to illegal activity, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). In most other contexts, the First Amendment prohibits regulation based on the content of the speech. *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n,* 447 U.S. 530, 537-38, 100 S.Ct. 2326, 2333-34, 65 L.Ed.2d 319 (1980).

In *Central Hudson,* the Supreme Court articulated the following four-part test for assessing the constitutionality of a restriction on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the

> asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S.Ct. at 2351. In applying the *Central Hudson* analysis to Florida's restriction of Fane's commercial speech, the district court found that Florida's prohibition of in-person solicitation by CPAs failed to advance the governmental interest asserted and was more extensive than was necessary to serve that interest.[7]

[4,5] In reviewing the validity of Florida's restriction on in-person solicitation by CPAs, we must determine whether there exists a " 'fit' between the legislature's ends and the means chosen to accomplish those ends...." *Fox,* 492 U.S. at 480, 109 S.Ct. at 3035 (quoting *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 341, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986)). The relationship between the legislature's means and ends must be reasonable, but does not require perfection; furthermore, its scope must be "in proportion to the interest served." *Fox,* 492 U.S. at 480, 109 S.Ct. at 3035 (quoting *In re R.M.J.,* 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982)). Florida is not required to employ the least restrictive means to accomplish its ends, but it must utilize "a means narrowly tailored to achieve the desired objective." *Fox,* 492 U.S. at 480, 109 S.Ct. at 3035. Florida bears the burden of justifying its restrictions. *Zauderer,* 471 U.S. at 647, 105 S.Ct. at 2279.

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7 The first two prongs of the Central Hudson test are met. The speech in which Fane wishes to engage concerns a lawful activity and is not misleading; Florida's interest in regulating the accountancy profession is substantial.

[6] The Board attempts to justify Florida's proscription of in-person solicitation by CPAs on the basis of the need to preserve and protect the public's ability to rely on the independence and objectivity of CPAs who are, performing the attest function. The Board also contends that because there is no acceptable method of regulating in-person solicitation, a prophylactic rule against its utilization by CPAs is necessary to protect the public. Nowhere in the record, however, do we find that the Board has produced any evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation. Prophylactic restraints on commercial speech based on unsupported assertions or unsubstantiated fears are not acceptable. *Zauderer,* 471 U.S. at 647-18, 105 S.Ct. at 2279-80. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information...if the information also may be presented in a way that is not deceptive." *In re R.M.J.,* 455 U.S. at 203, 102 S.Ct. at 937. The availability to the general public of commercial information such as that Fane seeks to communicate is valuable enough to justify imposing the burden upon Florida of distinguishing "the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer,* 471 U.S. at 646, 105 S.Ct. at 2279. Broad prophylactic rules simply cannot be justified if the protections afforded commercial speech are to remain viable. *Id.* at 649, 105 S.Ct. at 2280-81.

Even if there were evidence before us to indicate that allowing CPAs who perform audit and review engagements to solicit in-person would undermine the integrity of financial statements, that still would not justify the total prohibition of in-person solicitation by all CPAs. CPAs who specialize in many aspects of the accounting profession have no occasion to attest to the accuracy of audits or financial

statements. If allowed at all, Florida's statute must be narrowly tailored to achieve its anticipated objective.

> A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.

Frisby v. Schultz, 487 U.S. 474, 485, 108 S.Ct. 2495, 2502-03, 101 L.Ed.2d 420 (1988) (citation omitted). Florida's restriction bans far more speech than is necessary in light of the justification offered for its restraint.

[7] If a state can combat wrongdoing by direct means, it cannot use its interest in foreclosing harm to justify broad-scale restraints on speech. *Shapero,* 486 U.S. at 476, 108 S.Ct. at 1923. Regulatory requirements exist in Florida that can be utilized to preserve the independence of CPAs who perform the attest function. The Board does not offer any explanation as to why those requirements do not adequately afford the protection which it seeks. First and foremost, Fla. Stat. Ann. § 473.315(1) (West 1991) prohibits a CPA from expressing "an Opinion on the financial statements of an enterprise unless he and his firm are independent with respect to such enterprise." Second, CPAs are forbidden from engaging in any kind of fraudulent or deceptive conduct. *See* Fla. Stat. Ann. § 473.323(1)(f), (k) (West 1991).[8] Third, negligent certification of financial statements could give rise to tort liability. The Florida Supreme Court recently held that in certain circumstances, a CPA can be held liable to those persons whom he "knows" will rely on his

8 CPAs who violate Florida statutes regulating the practice of public accounting can be punished by penalties ranging from fines to license revocation. *See* Fla.Stat.Ann. § 473.323(3)(b), (c) (West 1991).

opinion, regardless of whether the CPA is in privity with them. *First Florida Bank v. Max Mitchell & Co.,* 558 So.2d 9, 15 (Fla.1990). The Board has the duty to at least explore less intrusive alternatives than a blanket ban on in-person solicitation imposed on all CPAs. *Shapero,* 486 U.S. at 477-78, 108 S.Ct. at 1923-24. Furthermore, the utilization of an advertising ban to protect the ethical or performance standards of a profession is impermissible. *Central Hudson,* 447 U.S. at 564 ,100 S.Ct. at 2350. *See also Virginia State Board of Pharmacy,* 425 U.S. at 769, 96 S.Ct. at 1829.[9]

[8-10] The Board asserts that speech protected by the First Amendment, whether commercial or ideological, may still be subjected to legitimate time, place, and manner restrictions, so long as those regulations are based on criteria that is content neutral. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983). A time, place, and manner restriction seeks merely to regulate when, where, and how the protected activity may take place. *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986). The regulation challenged by Fane does more, however, for it acts as an unqualified ban on in-person solicitation rather than regulating the details of when, where, and how a CPA may engage in such solicitation. Furthermore, a constitutionally permissible time, place, and manner restriction must not be based upon the content of the speech. *Consolidated Edison,* 447 U.S. at 536, 100 S.Ct. at 2332-33. Florida's regulation of in-person solicitation by CPAs is not content neutral. It is a speaker-specific, unqualified ban on a category of expressive activity. Only CPAs who wish to speak directly to potential clients

9 Because we find that Florida's ban is an impermissible restriction of commercial speech in violation of the First Amendment, we need not address Fane's equal protection argument.

are restrained. The appropriate bounds of time, place, and manner restrictions on commercial speech are clearly exceeded by Florida's statute.[10]

The Board also argues that its position is supported by *Ohralik*, 436 U.S. at 447, 98 S.Ct. at 1913 (upholding a ban on in-person solicitation by attorneys) and *National Funeral Servs., Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 409, 107 L.Ed.2d 374 (1989) (upholding a ban on in-person solicitation by funeral directors selling pre-need burial services). The district court concluded that *Ohralik* and *National Funeral Services* do not apply to this case because the nature of the accounting profession and its soliciting targets differs in material respects from the legal and funeral services professions and their soliciting targets, making the imposition of such a ban on CPAs unnecessary.

As the majority opinion in *Ohralik* indicates, and as Justice Marshall's concurrence makes clear, the holding of *Ohralik* is limited. "[T]he solicitation of business, under circumstances—such as those found in this record—presenting substantial dangers of harm to society or the client independent of the solicitation itself, may constitutionally be prohibited by the State." 436 U.S. at 470, 98 S.Ct. at 1926 (Marshall, J., concurring in part and concurring in

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10 Fane objects to our consideration of the Board's time, place, and manner argument because the Board did not present it to the district court. Although we generally decline to consider a legal theory that was not raised at the district court level, we have the discretion to consider an argument first made on appeal. *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 989 (11th Cir. 1982). We may exercise that discretion if the omitted issue involves a pure question of law and if refusal to consider it would result in a miscarriage of justice. *Id.* at 989-90. Consideration of legal arguments not presented to the district court is especially appropriate on appeal from summary judgment. *Id.* at 990. Consequently, we have considered the Board's argument, but find that it has no merit.

the judgment). The majority opinion rests on whether an Ohio attorney disciplinary rule had been constitutionally applied to *Ohralik*. *Id.* at 467-68, 98 S.Ct. at 1924-25. Indeed, *Ohralik* did not challenge the rule on its face, and conceded its constitutionality in some contexts. *Id.* at 461-62, 466 n.27, 98 S.Ct. at 1921-22, 1924 n.27. *Ohralik* deals with an outrageous situation in the area of attorney solicitation.[11] Many cases will fall between the extremes of *Ohralik* and cases such as *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), where solicitation by attorneys is clearly permitted because of its political expression and association value. *Ohralik*, 436 U.S. at 471-72, 98 S.Ct. at 1926-27 (Marshall, J.).

We are presented here with such an intermediate case in the context of another class of professionals—CPAs.13 The possibilities for overreaching, invasion of privacy, exercising undue influence, and outright fraud that the Supreme Court found were cause for concern if lawyers were allowed to solicit in-person are remote in the accounting profession. *See Ohralik*, 436 U.S. at 464-66, 98 S.Ct. at 1922-24 Solicitation by a CPA does not entail tee "coercive force of the personal presence of a trained advocate." *Zauderer*, 471 U.S. at 642, 105 S.Ct. at 2277. Likewise, the solicitation of a business person by an accountant is in no way comparable to the intrusive solicitation of a family member by a salesperson of funeral services at a time of emotional vulnerability. *See*

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11 Ohralik solicited business from two young accident victims, approaching one while she lay in traction in a hospital bed. He employed a concealed tape recorder to assist him in his solicitation efforts and emphasized the contingent nature of his fee to make his offer appear cost-free and irresistible. In addition, he refused to withdraw even when requested to do so by his client and misrepresented himself to her insurance company. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 450-52, 98 S.Ct. 1912, 1915-17, 56 L.Ed.2d 444 (1978).

National Funeral Services, 870 F.2d at 142-45. We agree with the district court that the ban on in-person solicitation endorsed in *Ohralik* and *National Funeral Services* is not necessary to protect the general public from solicitation by a CPA.

III. CONCLUSION

We do not lightly interfere with a state's power to regulate the professions which practice within it. Nevertheless, the state's regulatory power cannot be used to insulate restrictions of constitutionally protected speech from our review for constitutional infirmity. *See Peel*, _____ U.S. at _____, 110 S.Ct. at 2291-92. In this case, Florida's restriction of in-person solicitation by CPAs does not directly advance the state's asserted interest. The justification offered for the ban could be served equally well by existing regulations imposed on the accounting profession or by a more limited restriction of the protected speech. We therefore affirm the district court's order granting summary judgment in favor of Fane and enjoining the State of Florida from enforcing its ban on in-person solicitation by CPAs.

AFFIRMED.

EDMONDSON, Circuit Judge, dissenting:

States have a strong interest in regulating the practice of professions within their borders. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). Because I believe states are largely free to regulate the professionals which they license, I reach a different conclusion in this case. My view is that Florida's regulation, prohibiting face-to-face solicitation of clients by certified public accountants (CPAs), should stand.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), is extremely persuasive and supports Florida's prohibition against in-person solicitation

by CPAs. In *Ohralik*, the Supreme Court upheld a state regulation prohibiting in-person solicitation of clients by lawyers. The Court's reasoning focused on the potential harms that face-to-face solicitation poses for prospective clients. Because in-person solicitation inherently opens the door to "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" *Id.* at 462, 98 S.Ct. at 1921, the Court recognized the need for a state to enact a rule designed to protect lay people. With advertising generally the recipient may simply turn away, but in-person solicitation may exert pressure and often demand an immediate response from the prospective client, who then has less opportunity for reflection. *Id.* And because in-person solicitation is not visible or otherwise open to public scrutiny, such solicitation is hard to oversee effectively or to regulate. *Id.* at 466, 98 S.Ct. at 1924. The Court, consequently, recognized the need for a state to adopt a prophylactic measure, such as a ban on in-person solicitation, to prevent harm from occurring. *Id.* at 464, 98 S.Ct. at 1923.

In upholding the state's prohibition, the Court in *Ohralik* noted that people contacted [illegible]son might be especially susceptible to a lawyer's pres[illegible] since lawyers are "advocate[s] trained in the art of persuasion." *Id.* at 465, 98 S.Ct. at 1923. But this quoted language was not at the heart of the *Ohralik* reasoning. I think *Ohralik's* reasoning reaches professionals other than lawyers. After all, not all lawyers are trained advocates; now relatively few lawyers are directly involved in litigation or advocacy roles. In-person solicitation is potentially harmful chiefly because lawyers, as professionals, have (and are perceived by lay people to have) specialized knowledge beyond that of their solicited clients. The special leverage, or ability to pressure others, that lawyers have is not so much a function of their oratory skill; instead, it stems from the gap in knowledge between the professional and the lay person. The client, when compared to the professional, is almost always unsophisticated when

it comes to the subject of the professional's work. The danger lies with the lawyer who intimidates or baits the potential client with the lawyer's specialized knowledge while simultaneously preying on the client's relative ignorance. The result is that the client may be pressed to agree to hire the lawyer for fear of losing out on legal rights and remedies that the client does not fully understand or, because the directly solicited client has little time to compare the fees and qualities of competing lawyers, the client may employ the wrong lawyer or agree to pay too much.

CPAs also have (and are perceived to have) knowledge beyond that of their potential clients which CPAs could well use to entice or to intimidate clients. For example, CPAs provide tax advisory services and financial management services to clients, when many of these prospective clients may be ignorant of their potential rights and of their potential liabilities. To think that clients may be as vulnerable to a seemingly knowledgeable CPA as accident victims are to an ambulance chasing attorney is not unreasonable. In addition, by virtue of having the title "certified public accountant" bestowed upon him by a state, a CPA is cloaked with an aura of competence that can overawe prospective clients (just as easily as a persuasive lawyer could) due to the appearance of special knowledge that is associated with his state licensure.** In the light of their specialized, professional knowledge, CPAs can be forceful and persuasive. Anyone who has ever signed, without fully understanding,

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** In Florida, non-licensed tax preparers, bookkeepers, management advisory consultants and the like are permitted to engage in direct, in-person, uninvited solicitation. These people, however, are neither permitted to perform the "attest function," which is specifically reserved for CPAs, nor to hold themselves out as having that assured special competence and reliability that the title "CPA" gives. For the state to condition its grant of special privilege and standing upon the acceptance of additional restraints, including some prophylactic rules, is not unreasonable.

a tax return or other financial statement prepared by a CPA simply because the CPA says "You sign here," knows just how persuasive a CPA can be.

Some differences in the circumstances surrounding solicitation of clients by lawyers and solicitation by CPAs undeniably exist; and, in general, the state's interest in regulating the legal profession (to the extent that lawyers as a group may still be seen as officers of the state's courts) may possibly be a bit greater. But I think for the purpose of constitutional analysis, the two professions are more alike than they are different. For instance, it may well be true that in most audit engagements potential clients of CPAs will not be under the kind of emotional distress that a potential personal injury client would be under when solicited by a lawyer. But nothing said in *Ohralik* seems to limit rules against in-person solicitation of clients by lawyers to rules barring soliciting personal injury clients in distress. In addition, as the Supreme Court noted in *United States v. Arthur Young and Co.*, 465 U.S. 805, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984), a client has a great deal to lose, for example, if an auditor gives a qualified, adverse or disclaimed opinion as to the accuracy of a company's financial records. *Id.* at 818 n.13, 104 S.Ct. at 1503 n.13. As such, while a soliciting CPA may not be in the posture of addressing an injured person, he can easily be in the position of addressing a client who has everything to gain from a glowing, unquestioning opinion, and everything to lose from any less favorable opinion. So, in addition to the problems that lurk whenever professionals are allowed to engage in face-to-face solicitation, there is an incentive for fraudulent CPAs to solicit clients by promising to overlook financial misstatements or by promising to give a favorable review. *See Id.* at 461, 98 S.Ct. 1921.

We should also recall how hard it is for a state to monitor in-person solicitations. Because of the heavy reliance that

the public places in the accuracy of financial statements reviewed by CPAs, *Florida Bank v. Max Mitchell & Co.*, 558 So.2d 9 (1990), and for other reasons that seem to apply to professionals in general, there is a strong state interest that CPAs be prevented from compromising their integrity by soliciting clients underhandedly. And, a ban on in-person solicitation is directly related to that state interest.

In *Ohralik*, the Court specifically noted that a "state does not lose its power to regulate commercial activity deemed harmful to the public wherever speech is a component of the activity." *Ohralik*, 436 U.S. at 456, 98 S.Ct. at 1919. Therefore, simply because Florida's regulation involves speech does not mean that the regulation must be struck down on constitutional grounds. The *Ohralik* Court said that "procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." *Id.* at 459, 98 S.Ct. at 1920 (citations omitted). This point is to me the important one.

The First Amendment provides greater or lesser protection to speech depending on its context, that is, whether the speech is political, commercial or something else. The degree of protection afforded commercial speech is toward the low end of the scale. *See Ohralik*, 436 U.S. at 456, 98 S.Ct. at 1918 ("[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.... And, I believe the degree of protection from state interference is still lower when the states are carrying out their traditional and important job of policing the professions. The *Ohralik* Court specifically recognized that "[w]hile entitled to some constitutional protection," a professional's conduct is "subject to regulation in furtherance of important state interests." *Id.* at 459, 98 S.Ct. at 1920.

Even if I personally questioned that the Florida rule is necessary for an ordered CPA profession, it would not be my place just to second guess state officials about the state rule's wisdom or effectiveness. What is important for me to see is that reasonable people, such as those that I expect comprise the Florida Board of Accountancy, could think that the rule against in-person solicitation of clients functions to assure greater competence of CPAs, more reasoned selection of CPAs by lay people, and the accuracy of audit statements upon which the public relies. And, even if a less sweeping rule might do, that circumstance would be of no great significance. I cannot say that the rule Florida has chosen is an unreasonable solution to the problems inherent in uninvited, in-person solicitations of clients for profit. *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989) (manner of regulating speech need not be "absolutely the least severe that will achieve the desired end"; fit between ends and means need only be "reasonable").

I would uphold the Florida rule as a legitimate use of the state's authority to regulate a profession within its borders and, therefore, would vacate the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3943

SCOTT FANE,

Plaintiff-Appellee,

versus

FRED H. EDENFIELD, JR., RICHARD J. ABOUD, WHIPPLE VAN NESS JONES, JR., MARGARET F. STROUPE, DEAN F. DENISON, WILLIAM R. MARTIN, JOSEPH R. MILLSAPS, ANTONIO L. ARGIZ, JEROME A. SCHINE, in their official capacities as members, Board of Accountancy,

Defendant-Appellants.

FILE COPY

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 31 1991
MIGUEL J. CORTEZ
CLERK

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

v.

FRED H. EDENFIELD, JR., et al.,

Defendants.

Civil Case No.
TCA 88-40264-MMP

AFFIDAVIT OF LOUIS W. DOONER

My name is Louis W. Dooner. I was born in Tampa, Florida, June 18, 1928, attended local secondary schools and graduated from the University of Florida with a major in accounting in 1953.

Since graduation from college I have been in public accounting except for one year (1957-58) when I was controller of Three Bays Steamship Co., Miami, Florida. My public accounting career began in 1953 when I joined the staff of Price Waterhouse & Co. in New York City. After four years with that firm in their New York, Hartford and Atlanta offices and following one years absence from the profession I joined the staff of Morris and Grace, a local firm, in Coral Gables, Florida. In December of 1959 I moved to Quincy, Florida, to conduct a practice together with Mr. William D. Bell. This firm practices today under the name of Dooner, Edwards & Fletcher. In 1983 I became inactive in the day to day practice but serve as a consultant to the firm.

In December 27, 1979, I was appointed to the Florida Board of Accountancy and served as Chairman in 1981 and 1982. I was Chairman and or a member of the Probable

Cause Panel in 1980 and from 1983 to January 5, 1988, when my term on the board expired.

I served as President of the Florida Institute of Certified Public Accountants and also served on numerous committees as a member and/or chairman, including legislative policy and long range planning for which I was named outstanding Committee Chairman. I held numerous offices in both local chapter and state wide.

I have been a member of the American Institute of Certified Public Accountants since 1959 and served as a member of Council (governing body) for seven years and on and as chairman of numerous committees and task forces, also served as a member of the Auditing Standards Board which promulgates Generally Accepted Standards and as a member for three years and as chairman for three years of State Legislation Committee.

As a member of the National Association of State Boards of Accountancy I served on numerous committees including the Committee on legislation and regulation. I also served as a member of the special committee on relations with government. I designed what has come to be known as the Florida Project whereby the Florida Board of Accountancy and the Regional Inspectors General for federal agencies entered into an agreement of cooperation to better regulate audits, of organizations receiving federal funds. This project has now been adopted by and will soon be in place in thirty three states.

In November of 1988 I was named the Distinguished Alumnus of the Fisher School of Accounting, University of Florida, by Beta Alpha Psi, national honorary accounting fraternity.

I have been asked by defendant in this case to set forth my opinion as to the need and appropriateness of the ban

on direct, in-person, uninvited solicitation (rule 21A.24.002). My opinion as set forth below is based upon experiences as a practicing CPA and as a member of the Florida Board of Accountancy.

To more fully understand the ban on direct, in-person, uninvited solicitation by Certified Public Accountants in Florida it will be helpful to look briefly at the history of the profession in the United States.

In the late 1800's investors in England found that in order to be satisfied that their investments in America were being properly managed they enlisted the assistance of accountants to visit the business and report back as to the financial condition and results of operations of these far flung enterprises.

At first, these accountants traveled from England, but with travel and communication being as limited as it was in those days it was found that it was far more efficient for the accountants to remain in America and perform the required audit services. Around 1890 the State of New York enacted the first state law to license and regulate Accountants rendering opinions on financial statements based on an audit of the accounting records of the enterprise. These licensees became known as certified public accountants. Their sole purpose was to render opinions on financial statements.

In the early 1900's the, Florida legislature enacted a statute which provided for the licensure of qualified persons to render independent opinions on financial statements of others based on an audit of their account records.

Our present accountancy law provides that Certified Public Accountants are the only persons who may render opinions on financial statements of others based on an audit conducted in accordance with Generally Accepted Auditing

Standards. The independent opinion on financial statements is the only reason for the existence of a regulated public accounting profession.

As was stated earlier the profession was established for the purpose of auditing financial statements and it has been this function that has become so important to the financial community and to the economy of the United States. Without the independent audit it would be impossible to raise capital with which to finance industry. The profession has done an outstanding job in this area and has come to be one of the most highly respected and trusted professions in this country today.

Part of the development of this highly respected profession was the evolution of a code of conduct which assured the users of financial statements that the CPA who opined on the statements was independent of the subject of the statements and this independence had not been impaired in anyway including the solicitation of the client. The auditor's independence means that he is so free of his

client that he is willing to report the facts as they are found regardless that it may be detrimental to the client. If he has solicited the client he will be beholden to him.

In order to protect the integrity of opinions on financial statements public accountancy was defined to include all services rendered to the public by a CPA involving the use of accounting skills. This has meant over the years that the CPA conducted himself in the same manner whether the service was an audit or some other service.

As the volume of other services expanded the strict code of conduct applicable to audits came to be a hindrance to some CPA's who wanted to expand through advertising, solicitation, payment of finder fees and other means. Many of these CPA's have no desire to perform audits and in fact

do not. If they were not CPA's they would be free to conduct themselves in any legal manner they choose, rendering all services except audit without the burden of the high standards of the CPA.

The audit function is too important to the economic well being of this country to allow it to be torn down by a few who want the prestige and public trust that their predecessors have earned without being willing to continue to conduct themselves in a manner that will assure the continued integrity of opinions on financial statements. The ban on direct, in-person, uninvited solicitation is for the protection of users of financial statements. It is not to protect the public from solicitors.

It has been suggested that because the American Institute of Certified Public Accountants (AICPA) and the Florida Institute of Certified Public Accountants (FICPA) amended their rules to not prohibit direct, in-person, uninvited solicitation of a potential client, it means that these organizations are not in favor of such a ban. Nothing could be further from the truth. This action was taken initially by the AICPA to avoid action by the United States Department of Justice. It was the opinion of legal counsel that such a ban by a private organization would not be permitted under federal anti trust laws.

At the 1980 annual meeting of the AICPA a resolution was passed that called for a special committee to study the question and report back to the 1983 annual meeting which it did in the form of "Report of The Special Committee on Solicitation."

I served on that committee and can assure the court that the recommendations of that committee were not based on the fact that the members were desirous of eliminating the ban on direct, in-person, uninvited solicitation. The committee made five recommendations:

1. The AICPA Code of Professional Ethics should not contain a general prohibition of direct uninvited solicitation of potential clients or a narrower prohibition of oral direct uninvited solication of potential clients.

2. Rule 502 of the Code of Professional Conduct should be amended to prohibit certain forms of solicitation, as follows:
Rule 502—Advertising and Other Forms of Solicitation. A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive. Solicitation by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct is prohibited.

3. The board of directors should issue a policy statement expressing its view that members should exercise appropriate restraining if they elect to engage in the commercial practices of advertising and solicitation.

4. The AICPA should not develop a program to influence state legislatures to adopt more stringent solicitation bans than the AICPA itself can impose.

5. The AICPA should not require its members to file with the AICPA copies of all direct uninvited promotional literature simultaneously with, or within a reasonable time after, its dissemination to potential clients.

As can be seen from the foregoing quotations from the Report of the Special Committee on Solicitation the primary concern of the committee was the affect on the AICPA and not the merits of the issue from the standpoint of the public interest. We were very much concerned that if action was

taken by the FTC and the AICPA were required to sign a consent agreement it would contain a proscription against ever making an utterance on the subject as had occurred in the past with regard to prohibition on competitive bidding. It was felt that we would be better off to not have the ban and have the ability to speak on the subject than to not have the ban and not the ability to speak on the subject.

The ban on direct, in-person, uninvited solicitation is extemely narrow and only proscribes the uninvited contact whereby the potential client is required to make a response. It may be helpful to look at what is permitted under this rule.

1. May a CPA attend trade shows, luncheon clubs and other such meetings and engage in direct, in-person, solicitation?

   Yes, because those in attendance by their presence, have issued an invitation to be solicited.

2. May a CPA send a personal letter to a potential client requesting an appointment to discuss his qualifications to render services?

   Yes, because the decision to enter into the conversation rests with the potential client.

3. May a CPA send brochures and other advertising material to a particular member of management of a potential client?

   Yes, this activity as in the previous example places the responsibility for initiating personal contact with the potential client.

The only type of solicitation that a CPA may not engage in is that that places the potential client in the position of having to make an immediate oral response thus opening the door to overreaching and vexatious conduct by the CPA or conversely, and far more damaging to society, the

opportunity for the potential client to place the soliciting CPA in a compromising position as part of the bargain reached since the CPA is obviously in need of business and may be willing to bend the rules. Such activity is not in the best interest of the public which is so dependent on independent opinions on financial statements based on an audit conducted in accordance with generally accepted auditing standards.

• • •

Pursuant to 28 U.S.C. paragraph 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct. Executed on January 4, 1989, Quincy, Florida.

Louis W. Dooner

STATE OF FLORIDA
COUNTY OF GADSDEN

On this 3rd day of January, 1989, before me, personally appeared LOUIS W. DOONER, to be known and known to me to be the person described in and who executed the above instrument and acknowledged to me that he executed the same.

Deborah G. McMillan
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

v.

FRED H. EDENFIELD, JR., *et al.*,

Defendants.

Civil Case No.
TCA 88-40264-MMP

SUPPLEMENTAL AFFIDAVIT OF SCOTT FANE

1. I am the plaintiff in this action, and I submit this supplemental affidavit in further support of plaintiff's motion for summary judgment.

2. I have carefully read both the memorandum that the defendants filed in opposition to my motion for summary judgment and the affidavit of Mr. Louis W. Dooner, and I believe that there are two points that require clarification.

3. First, contrary to the impression that might be drawn from defendants' submissions, there are many CPAs in active practice who rarely, if ever, exercise the attest function. Generally, the attest function is employed to verify the accuracy of financial statements used to raise capital — either from lending institutions or investors. Thus, CPAs engaged in the preparation or audit of such financial statements regularly "attest" to their accuracy. On the other hand, accountants like myself who specialize in corporate and individual tax seldom, if ever, exercise the attest function. This is also true in a number of other areas in which other CPAs specialize: financial planning, employee benefits, computer consulting, management information systems, estate planning and litigation support.

4. Thus, while the ability to attest to the accuracy of financial statements and audits is one factor that distinguishes CPAs from accountants and other financial professionals, it is only one of many factors, several of which may be even more important. To start with, CPAs alone are licensed, and hence have demonstrated their educational background, competence, expertise, and good moral character. Moreover, CPAs must take continuing education courses in accounting, and, for that person, must maintain a high level of professionalism. Finally, certain communications between CPAs and their clients are privileged under Florida law, which is a critical distinction between CPAs and accountants. Most corporate clients, and many individuals clients (particularly those who are wealthy), rely heavily on the fact that discussions with their CPAs are entirely confidential, and the ability to assure confidential handling of sensitive financial information is often the cornerstone of a CPA's relationship with a client.

5. Second, defendants' submissions can also be read to imply that a face-to-face solicitation, where the prospective client plays no role in initiating the conversation, is somehow fraught with the danger that in such circumstances a CPA might be willing to surrender his independence in order to secure business, and, conversely, a business may be inclined to attempt to entice a CPA to compromise his integrity. Indeed, defendants even suggest that a CPA engaged in solicitation may be more "willing to bend the rules" than CPAs who do not solicit.

6. Having practiced as a CPA and accountant in jurisdictions that do not prohibit direct, uninvited solicitation, I have extensive experience with in-person, direct, uninvited solicitation of clients by CPAs. I have engaged in such solicitation myself when I was in solo practice, and I have been employed at CPA firms — including two major, national firms — that also engaged in such solicitation. I am

unaware of any instance in which, during the course of such solicitation, a CPA offered to give-up his independence to secure a client or a business sought to entice a CPA to compromise his integrity by promising to send the CPA its work. In light of my experience, and in my professional opinion, that scenario is inherently implausible. To start with, there are powerful deterrents against such conduct by CPAs. Improperly exercising the attest function may well constitute fraud, which is both a crime and an intentional tort, and thus a CPA would be risking jail and financial ruin by knowingly engaging in such conduct. Moreover, if caught, the CPA would likely be stripped of his license, and subjected to public humiliation. For these reasons, CPAs are exceedingly careful before attesting to the accuracy of any financial information. Second, while a CPA engaged in direct solicitation is certainly seeking new business, generally his major interest is in securing long-term clients. Any businessman interested in obtaining a "clean" but undeserved financial opinion is, by definition, not a promising client.

7. While the defendants imply that the lack of familiarity between a CPA and potential client might be some sort of breeding ground for improper conduct, in my experience, and based on my professional opinion, the opposite is true. The only situation in which I can imagine a CPA compromising his independence is where a long-term client, with whom the CPA has developed a close relationship, is in serious trouble and needs a "clean" financial opinion. Perhaps in those circumstances a CPA might be persuaded to bend the rules to help his client. Even in those circumstances, however, most CPAs would place their independence above the needs of their client, if for no reasons than the enormous risks that giving a false certification would carry.

* * *

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct.

Scott Fane

Executed on: January 25, 1989

(2)

No. 91-1594

Supreme Court, U.S.
FILED
MAR 30 1992
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In The
Supreme Court of the United States
October Term, 1991

FRED H. EDENFIELD, et al.,
Petitioners,

v.

SCOTT FANE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

v. CASE NO. TCA 88-40264MMP

FRED H. EDENFIELD, JR., et al.,

Defendants.

ORDER

This case comes before the court on plaintiff's motion for summary judgement (Doc. 13). The court heard oral argument and has reviewed all affidavits, exhibits, and memoranda submitted by the parties in making its decision. The plaintiff is entitled to summary judgement as a matter of law, and his motion is GRANTED to the extent discussed below. *See* Fed. R. Civ. P. 56; *Rollins v. TechSouth. Inc.*, 833 F.2d 1525 (11th Cir. 1987).

I. STATEMENT OF THE CASE

The plaintiff, Scott Fane, is a certified public accountant licensed to practice in Florida. Mr. Fane moved from New Jersey to Florida in 1985 and seeks to establish an accountancy practice. In order to build his clientele, he wants to engage in direct, inperson, uninvited[1] solicitation of potential clients. He is precluded from doing so by Rule 21A24.002 of the Florida AdministrativeCode[2] which specifically prohibits this type of commercial speech. The defendant does not dispute that the rules restrict truthful commercial speech about lawful activities, and thereby raise first and fourteenth amendment issues. The present debate centers on whether the restrictions pass constitutional muster in light of recent Supreme Court decisions upholding similar restrictions on attorney solicitation.

The defendant asserts that the primary objective of the rule is to protect the CPA's integrity, independence, and objectivity while performing the "attest function." The "attest function" is the issuance of an independent opinion

1 Defendants concede that Florida's regulations do not prohibit direct, inperson, *invited* solicitation. The state's definition of "invited" is rather broad. For example, a general business discussion during a social gathering invites solicitation. *See* Defendants' Response to Motion for Summary Judgement (Doc. 23, pp.15 16).

2 Section 21A24.002(2) provides "[a] licensee shall not by any direct, inperson, uninvited solicitation solicit an engagement to perform public accounting services...[c] where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication. Section 21A24.002(3) makes unlawful "any communication which directly or indirectly requests an immediate oral response from the recipient."

regarding a client's financial soundness based on an audit or review of a client's financial statements.[3]

In addition to protecting CPA's and the attest function, the restriction seeks to prevent solicited clients from luring the CPA into a collusive relationship whereby a fraudulent attestation is issued. Such attestations may be used to deceive third parties. Those third parties may be the client's business associates or members of the general public who rely on the CPA's attestation. Additionally, the defendant seeks to preserve the restriction as a way to avoid the difficulties of proving and punishing CPA misconduct.

The defendant claims that the validity of these interests and the means used to serve them are supported by analogy to the Supreme Court's analysis in its series of attorney solicitation cases. *See Shapero v. Kentucky Bar Association,* 486 U.S. 466, 108 S. Ct. 1916 (1988) (personalized mailings to potential clients with foreclosure problems); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626 (1985) (printed advertisements directed to drunk drivers and Dalkon shield users); *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978) (direct, inperson, uninvited solicitation of accident victims). However, a careful analysis of that series of cases compels the opposite conclusion.

3 Only CPA's perform the attest function, therefore the prohibition does not restrict other providers of related financial services. Although that point seems to dispose of the plaintiff's equal protection argument, this court concludes that the regulation is unconstitutional on other grounds, and never reaches the merits of that claim.

II. INTRODUCTION

Government suppression of the free flow of truthful commercial speech regarding lawful activities should be tolerated only when a substantial government interest is being served by regulations which directly advance that interest. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 638 (1985) (citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* 447 U.S. 557, 566 (1980)). Furthermore, those regulations must be narrowly tailored to achieve the desired objective. *Board of Trustees of State University of New York v. Fox,* 109 S. Ct. 3028, 3035 (1989) (least restrictive means test explioitly rejected).

The defendant asserts that the justifications for banning direct, inperson, uninvited solicitation by attorneys supports a similar ban on like solicitation by CPA's. The Supreme Court's rationale for upholding the ban on attorney solicitation focuses on two general concerns or factors uniquely associated with attorneys: the possibility of undue influence and overreaching, and the absence of regulatory control. *Shapero v. Kentucky Bar Association,* 486 U.S. 466, 475, 108 S. Ct. 1916, 1922 (1988) When applied to the present case, this analysis reveals that those concerns are not present in the context of direct, in person, uninvited solicitation by CPA's. Even if such concerns were found to be present, a logical distinction between the different types of CPA solicitation could not be made to justify their different treatments.

III. THE FIRST FACTOR

The Supreme Court emphasized in its most recent attorney solicitation decision that "[i]n assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." *Shapero v. Kentucky Bar Association,* 486 U.S. 466, 475, 108 S. Ct. 1916, 1922 (1988). In *Shapero,* the Court struck down a ban on attorneys' direct mailings to potential clients with known particular problems. *Id.* In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626 (1985), the Court used similar reasoning in striking down a rule which prohibited newspaper advertising by attorneys. In contrast, the Court in *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), upheld an unqualified ban on direct, inperson, uninvited solicitation of potential clients by attorneys.

In the above cases, the Court recognized that the dangers associated with inperson attorney solicitation which justify its absolute prohibition are not sufficiently strong with respect to other forms of solicitation to warrant similarly harsh treatment. *Shapero,* 486 U.S. at 472, 108 S. Ct. at 1921; *Zauderer,* 471 U.S. at 641; *Ohralik,* 436 U.S. at 465. The dangers associated with direct, inperson, uninvited solicitation by attorneys stem from the profession's training: this background increases the client's susceptibility to exploitation. *Shapero,* 486 U.S. at 475, 108 S. Ct. at 1922; *Zauderer,* 471 U.S. at 642; *Ohralik,* 436 U.S. at 46566. The relevant focus must be on the solicitor's training and opportunity to use this training when engaged in a particular mode of communication. Comparing the dangers threatened by CPA solicitation to the dangers associated with similar solicitation by attorneys reveals the weaknesses in defendants' argument.

First, the professional training of attorneys and CPA's is different. An attorney is "a professional trained in the art of

persuasion." *Ohralik,* 436 U.S. at 465. Unlike other forms of attorney solicitation, facetoface solicitation allows the attorney a chance to practice this art. *Zauderer,* 471 U.S. at 641 (direct solicitation involves "the coercive force of the personal presence of a trained advocate"). Furthermore, the unique behaviors associated with attorneys warrant more restrictive regulations involving inperson solicitation. *Shapero,* 486 U.S. at 472, 108 S. Ct. at 1921. The Supreme Court has expressed concern about the potential client's inability to avoid "a badgering advocate breathing down his neck." *Shapero,* 486 U.S. at 475, 108 S. Ct. at 1922. Consequently, when *lawyers* are engaged in direct, inperson, uninvited solicitation as compared to other sellers of goods or services, "it hardly need be said that the potential for overreaching is significantly greater." *Id.*

The Fourth Circuit extended this reasoning in upholding a ban on certain types of solicitation (including inperson) by people selling preneed funeral contracts. *National Funeral Services. Inc. v. Rockefeller,* 870 F.2d 136 (4th Cir. 1989), *cert denied,* 110 S. Ct. 409. The court noted the peculiarity of upholding a ban outside of the attorney context, noting the very "unique nature" of preneed funeral contract solicitation. *Id.* at 143 n.11. Judge Hall noted the uncommon similarities which warranted the analogy between preneed funeral contract and attorney solicitation as follows: "In both, an advocate trained in the art of persuasion is trying to convince an emotionally vulnerable layperson that he needs professional services." *Id.*

In contrast, CPA's are not trained to be coercive, persuasive, or to take particular advantage of a facetoface situation: their training emphasizes independence and objectivity. In light of the distinctive training given attorneys, the defendant cannot analogize to those Supreme Court decisions which deal with attorney solicitation to justify its ban on direct, inperson, uninvited solicitation by CPA's. The

dangers associated with inperson solicitation by uniquely trained attorneys simply are not present in the CPA context.

Second, the effect on the potential client from an attorney's direct, inperson, uninvited solicitation is substantially different from the effect when the same solicitation comes from a CPA. The two groups of potential clients that are targeted for solicitation are in significantly different positions. An attorney identifies a potential client by his "adverse conditions." *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 465 (1978). Usually, the attorney solicits "victims of misfortune."[4] The ban on attorney solicitation guards against invasions of privacy and additional distress. *Id.* Such dangers are present regardless of the attorney's style of approach or intentions. *Id.* at 465 n.25.

Another factor which enhances the likelihood of exploitation is the client's lack of sophistication about legal matters and services. Id. at 465 n.24. Thus, it is very likely that an attorney will be able to pressure the potential client into *immediately* accepting services that she may not need or want. The client may be left without the benefit of reflection, others' advice, or exploration of the available alternatives. *Id.* at 457.

Whereas attorneys may zero in on an "unsophisticated, injured or distressed lay person," *Id.* at 465, certified public accountants prefer to solicit prosperous business people as potential clients. These people tend to be knowledgeable about financial matters and successful enough to require specialized accounting services: they know what they need

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4 This court recognizes that some potential clients of attorneys will be in the same position as potential clients of accountants. Though these persons are objectively in the same position, the attorney's potential client is quite likely to be in adverse conditions, and will be confronted by a uniquely trained individual. These differences serve to distinguish objectively similar situations.

and whether the accountant can fulfill this need. Furthermore, the solicitation usually takes place in a business setting, a place where the potentialclient will not feel intimidated. Thus, the defendant cannot argue that the CPA solicitation regulation protects the potential client from harms which are likely to accompany the prohibited type of attorney solicitation.

Additionally, the defendant suggests that the disputed regulation prevents fraudulent attestations, thereby insuring that third parties will not rely on such to their detriment. Given the direct advancement requirement of *Central Hudson,*[5] the defendant's efforts to protect parties outside the professional relationship from indirect harm, though understandable, is inappropriate.

Even assuming that protection of third parties is appropriate, several significant problems remain with the defendant's argument. First, there is a causation problem when we try to link the alleged misconduct of the CPA with the harm incurred by the third party. Apparently, the defendant is concerned that the client will exert undue influence on the CPA and exploit a facetoface confrontation to persuade the CPA to commit a fraud. Ultimately, this assertion posits that the client is using the CPA to deceive that client's business associates or members of the general public about her financial soundness. The defendant seems to encourage regulating the innocent and valuable activities of one group to forestall the criminal activities of another. The link between regulation and—forbidden activities seems quite tenuous, if at all existent.

Second, there are problems with the defendant's suggestion that a CPA who uses direct, inperson, uninvited solicitation is more likely to commit fraud than a CPA who uses

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5 *See* discussion above a'p. 1.

other forms of solicitation. The differences between the prohibited solicitation and direct mailings, for example, seem far too superficial: in both cases, the eventual facetoface will give rise to possibilities for collusive and improper behavior. Thus, even if we assume that there exists a causal link between solicitation and misconduct, the defendant's varying treatment of different modes of solicitation is not justified.

Third, the defendant's implicit assumption that a client is more likely to approach an unknown CPA about illegal activities is unfounded. The more logical assumption is that such a client would more likely approach a known CPA with whom she has a long-standing and mutually profitable relationship: the client is more likely to trust such a person and the CPA has more to lose (i.e. an established client) by refusing to cooperate.

As the preceding clearly demonstrates, the defendant has failed to demonstrate a causal relationship between inperson, direct, uninvited solicitation, and accountant misconduct. Similarly, the defendant has failed to prove any harm to third parties as a result of the alleged misconduct. Assuming that defendant had proven some link between this type of solicitation and accountant misconduct, the defendant has not shown how the prohibited form of solicitation is more likely to result in misconduct compared to other permissible forms of solicitations. Therefore, Florida Administrative Code, §§ 21A 24.002 (2) & (3), fail to satisfy *Central Hudson's* requirement that the regulation directly advance a substantial government interest. *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York,* 447 U.S. 557, 566 (1980). Thus, the defendant cannot prove that there is a "reasonable fit" between the objective of preventing fraud and the harsh restriction on speech chosen to accomplish it. *Board of Trustees of the State University of New York v. Fox,* 109 S. Ct. 3028, 3035 (1989).

Further, even if this solicitation does directly result in the alleged misconduct, the present regulation does not reflect the only effective approach. *Fox,* 109 S. Ct. at 3034 (citations omitted). Under Florida Statutes, §§ 473.323(b) & (c), a CPA who engages in fraud in subject to fines, loss of license, and other penalties. As this statute directly addresses the alleged problem and provides adequate remedies, the blanket prohibition on inperson, direct, uninvited solicitation can be viewed only as an unnecessary restriction on speech. *See Shapero v. Kentucky Bar Association,* 486 U.S. 466, 476, 108 S. Ct 1916, 1923 (1988); *Fox,* 109 S. Ct. at 3035 (regulations unconstitutional if "more extensive than their object requires").

IV. THE SECOND FACTOR

The defendant's argument that a blanket prohibition of in person, direct, and uninvited solicitation by CPA's is necessary because of the difficulties in proving the occurrence of misconduct is also unpersuasive. In forwarding this argument, the defendant once again enlists the attorney solicitation cases for help. Once again, this reliance is misplaced. In the attorney context, the alleged misconduct in solicitation is "not visible or otherwise open to public scrutiny and for which it is 'difficult or impossible to obtain reliable proof of what actually took place.' " *Shapero v. Kentucky Bar Association,* 486 U.S. 466, 476, 108 S. Ct. 1916, 1923 (1988) (quoting *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 466 (1978)).

In the CPA context, however, proof regarding alleged misconduct is readily available. The relevant financial data could be obtained via discovery from the client, and then used by an independent accountant to check the questioned financial statements. Irregularities could be uncovered through this relatively simple process, and the accountant

who used improper methods and principles in violation of Florida Administrative Code, Rules 21A22.001008, could be appropriately disciplined. These facts are objectively verifiable. *Cf. Zauderer,* 471 U.S. 644 ("the indeterminacy of statements about law makes it improbable if not impossible to verify its accuracy or truthfulness").

V. CONCLUSION

Florida Administrative Code, §§ 21A24.002(2) & (3), places an unconstitutional ban on protected commercial speech in violation of the first and fourteenth amendments. The Board of Accountancy and State are hereby enjoined from enforcing that regulation as it applied to CPA's who seek clients through in-person, direct, uninvited solicitation in the business context.

DONE AND ORDERED this 13th day of September, 1990.

Maurice M. Paul
United States District Judge

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 91-1594

In The
Supreme Court of the United States
October Term, 1991

FRED H. EDENFIELD, *et al.*,
Petitioners,

v.

SCOTT FANE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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April 20, 1992

QUESTION PRESENTED

Were the courts below correct in concluding that Florida's ban on direct, in-person solicitation of new clients, which applies only to certified public accountants and not to accountants or other financial professionals, is not a content-neutral time, place, and manner restriction, but is instead an unqualified prohibition that violates the First Amendment?

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In The
Supreme Court of the United States
October Term, 1991

No. 91-1594

FRED H. EDENFIELD, *et al.*,
Petitioners,

v.

SCOTT FANE,
Respondent.

MEMORANDUM FOR RESPONDENT IN OPPOSITION

STATEMENT

1. Respondent Scott Fane is a certified public accountant ("CPA") licensed by the Florida State Board of Accountancy, whose members are the petitioners in this Court. Mr. Fane has practiced as a CPA for the past ten years, and has been employed at two of the prestigious "Big Eight" accounting firms, Touche, Ross & Co. and Deloitte, Haskins & Sells. In July 1985, Mr. Fane moved from New Jersey to Homestead, Florida, where he wanted to establish a tax accountancy practice by contacting small and mid-sizes businesses, either in-person or over the telephone, to set up appointments during which he could explain his qualifications, the services he offers, and the fees he charges. However, Florida is one of four states that prohibits CPAs from engaging in direct, in-person solicitation of potential clients.[1]

Under Fla. Stat. § 473.323(1)(l), CPAs may be subject to

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[1] The others are Georgia, Texas and Louisiana. *See* Pet. App. at 4 nn.2 & 3.

disciplinary action, including license revocation, for "[e]ngaging in direct, in-person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech *as determined by the rules of the board*." (Emphasis added). The Board of Accountancy has adopted a broad prohibitory regulation, under which a "licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication." Fla. Admin. Code § 21A.24.002(2). The regulation further states that "any communication which directly or implicitly requests an immediate oral response from the recipient" constitutes an unlawful solicitation, and that "[u]ninvited in-person visits *or* conversations *or* telephone calls to a specific potential client are prohibited." *Id.* § 21A.24.002(3) (emphasis added). As a result, Florida law forbids Mr. Fane from visiting or telephoning potential clients, and even from initiating a conversation with a potential client if he intends to solicit the potential client's business.

2. Mr. Fane brought this action for declaratory and injunctive relief on August 17, 1988, challenging the Board's anti-solicitation regulation on the ground that it violated his First Amendment right to engage in commercial speech. Mr. Fane also alleged that, by singling out only CPAs -- and not the other financial professionals against whom CPAs compete -- the ban unfairly discriminated against CPAs in violation of the Equal Protection Clause of the Fourteenth Amendment. The sole justification offered by the Board was that the ban was needed to protect a CPA's integrity, independence, and objectivity in performing the "attest function," -- *i.e.*, the rendering of an independent opinion regarding a client's financial statements, such that those who use those statements can rely on their accuracy. Only some CPAs ever perform this function, and, even for those CPAs, it constitutes only a small portion of their work.

After hearing argument, the district court granted summary judgment to Mr. Fane, finding that the regulation violated the First Amendment because it did not further the asserted governmental interest of preventing collusion between businesses and CPAs when the CPA attests to the client's financial statements. Pet. App. B, at 5-10. Based on this conclusion, the court enjoined the Board from enforcing its regulation as it applied to CPA solicitation "in the business context." Pet. App. B, at 11. In light of its disposition on First Amendment grounds, the court did not reach Mr. Fane's equal protection claim. Because the Board did not seek any stay, respondent and other CPAs have engaged in solicitation since the district court issued its order in September 1990.

3. The Eleventh Circuit affirmed, with Judge Edmonson dissenting. Applying the analysis that this Court has established for evaluating restraints on commercial speech, *see Board of Trustees v. Fox*, 492 U.S. 469 (1989), and *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the court first assessed whether the ban served a valid state interest. Pet. App. A, at 8-9. The Board had argued that the ban was needed "to preserve and protect the public's ability to rely on the independence and objectivity of CPAs who are performing the attest function." *Id.* at 6. But the court rejected that claim, finding that "[n]owhere in the record . . . has [the Board] produced any evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation." *Id.* at 9.

The court also concluded that, even if there were a nexus between the ban and the asserted state interest, there were means less draconian than an all-out ban that would achieve the state's goal equally well. *Id.* The court reasoned that, although the ban was aimed at preserving the sanctity of the attest function, it applied to all work performed by CPAs, even though many CPAs, like Mr. Fane, never exercise the attest function because they do not render opinions on audits or financial statements. *Id.* The court also noted that a number of "[r]egulatory requirements exist in Floirda that can be utilized to preserve the attest function . . . [and that the] Board does not offer any explanation as to why those requirements do not adequately afford the protection which it seeks." *Id.* at 10.

The court next addressed the Board's contention that the regulation should be given minimal scrutiny as a content-neutral time, place, and manner restriction. In rejecting this argument, the court concluded that the restraint cannot be so characterized because it "acts as an unqualified ban on in-person solicitation rather than regulating the details of when, where, and how" such solicitation may take place. *Id.* at 11. The court also held that the ban is not content-neutral because it is a speaker-specific prohibition "on a category of expressive activity" -- *i.e.*, the direct, in-person solicitation of potential clients. *Id.*

Finally, the court found that the Board's reliance on *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), was misplaced. The court reasoned that the factors that led this Court to uphold the ban on in-person solicitation by lawyers in *Ohralik* -- the possibility that a lawyer "trained in the art of persuasion" would use a face-to-face encounter to overreach and exert undue influence on a potential client -- are not present here. *Id.* at 13. In contrast to *Ohralik*, Florida's ban is not aimed at protecting prospective clients. Rather, it is intended to protect third parties who rely on financial statements from the possibility that in-person solicitation will somehow encourage CPAs to render dishonest opinions. On that issue, the court found *Ohralik* to be irrelevant. The Board timely filed a petition for rehearing and a suggestion for rehearing *en banc*, which were denied by Order filed on December 31, 1991.[2]

REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court. The decision below is not in conflict with any ruling by a federal court or the highest court of any state. Nor are the issues presented by petitioners sufficiently weighty to deserve the Court's attention: the ruling below is entirely consistent with this Court's ruling in

[2] The Board's Petition, at 1 n.1, can be read to suggest that the Board filed *only* a suggestion of rehearing *en banc*, which would not have tolled petitioners' time to file their petition in this Court. However, respondent was *served* with both a suggestion of rehearing *en banc* and a petition for rehearing, which presumably were both filed. Thus, unless the petition for rehearing was served but not filed, respondent does not contest the timeliness of this petition.

Ohralik v. Ohio State Bar Ass'n; the restraint at issue here cannot properly be characterized as a content-neutral time, place, and manner restriction; and the ruling in Mr. Fane's favor does not jeopardize any valid state interest.[3]

1. Petitioners contend that the ruling below is at odds with *Ohralik v. Ohio State Bar Ass'n*. But, as the courts below made clear, the state interest justifying a blanket ban on lawyer solicitation in *Ohralik* is not present here. *Ohralik*, which focused on the in-hospital solicitation of a seriously injured young woman, rests on the premise that people in need of legal services are often emotionally vulnerable or unsophisticated, and thus may be incapable of defending themselves from exploitation by self-interested lawyers. The Court upheld a broad ban on lawyer solicitation because nothing short of a prophylactic rule would adequately protect potential clients under those circumstances.

As the Board readily concedes, its anti-solicitation ban has nothing to do with protecting prospective clients, who are knowledgeable businesspersons, from solicitations by CPAs, who, unlike lawyers, are not "trained in the art of persuasion." *Ohralik*, 436 U.S. at 465. Rather, the Board argues that the ban is needed to protect *third parties* who rely on financial statements, because the sophisticated business clients solicited by a CPA *might* try to induce the CPA into knowingly committing fraud by falsely attesting to a financial report. Nothing in *Ohralik* suggests that an outright ban would be appropriate where, as here, the state is seeking to prevent fraudulent activity, not protect a client from

[3] Petitioners also suggest that the district court erred in resolving this case on Mr. Fane's motion for summary judgment, an argument the court of appeals concluded was without merit because it found no factual disputes that would require resolution at trial. Pet. App. A, at 5 n.4. Petitioners also gave no indication in the district court that they objected to having the case resolved on summary judgment. They did not comply with the district court's order requiring a party opposing summary judgment to submit a "statement of material facts as to which it is contended that there exists a genuine issue to be tried;" they did not "set forth specific facts showing that there is a genuine need for a trial" as required by Rule 56(e), Fed. R. Civ. P.; and they did not file an affidavit pursuant to Rule 56(f), Fed. R. Civ. P., identifying any discovery that would be needed for the presentation of their case.

overreaching by a lawyer. Rather, this Court has repeatedly held that the mere opportunity "for isolated abuses and mistakes does not justify a ban on that mode of protected commercial speech." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988); *see also In re R.M.J.*, 455 U.S. 191, 203 (1982).

What is more, the basic premises of the Board's argument are transparently implausible and contradicted by the evidence. The Board's argument depends on its assumptions (a) that CPAs who engage in solicitation are more likely to compromise their integrity than other CPAs and (b) that a client interested in a "clean opinion" on a financial statement would be more likely to importune a CPA who called out of the blue than a CPA he had dealt with previously. Not only are these assumptions far-fetched, but, as both lower courts emphasized, there is not a shred of evidence that supports the Board's theory that in-person solicitation by CPAs is a breeding ground for improper activity. Thus, while no one disputes the legitimacy of the state's interest in preventing fraud, both courts below properly found no nexus between that interest and the anti-solicitation ban. Under this Court's precedents, it is the Board that bears the burden of "affirmatively establish[ing]" that the ban vindicates a substantial interest. *Board of Trustees v. Fox*, 492 U.S. at 480; *see also Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647 (1985). Because the Board failed to present evidence that satisfies that burden, this case does not warrant review.[4]

---

[4] Although neither court below reached this issue, it is clear that, to the extent the Board clings to the contention that the ban is needed to serve interests unrelated to the attest function, the regulation unfairly discriminates against CPAs in violation of the Equal Protection Clause of the Fourteenth Amendment. Under Florida law, CPAs, accountants, tax preparers, bookkeepers, and other financial professionals may lawfully engage in a broad array of accountancy, tax, and other financial service activities, except for the attest function. Yet only CPAs are subject to the anti-solicitation rule, and that prohibition extends to solicitations for *all* services performed by CPAs, not just those requiring attestation. Not only is this discrimination invidious, it is utterly irrational, since *only* CPAs are licensed and closely supervised by the State. *See* Fla. Stat. §§ 473.306-308 & 473.322-324. In the event that this Court grants review, Mr. Fane intends to continue to press his equal protection claim in order to defend the judgment below.

2. Even more strained is petitioners' contention that the ban is not really a ban at all, but is instead a content-neutral time, place, and manner restriction, that should be given minimal scrutiny. The fundamental flaw in this argument is that the Board's regulation does not simply regulate when, where, and how CPAs may engage in direct in-person solicitation, which are the hallmarks of a time, place, and manner restriction. *See, e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 43 (1986); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 643 (1981). Instead, the regulation acts as a flat, unqualified ban, and hence it cannot properly be analyzed under the time, place, and manner doctrine.

Moreover, this Court has repeatedly made it clear that "a constitutionally permissible time, place, or manner restriction may not be based upon either the content or the subject matter of the speech." *Central Hudson*, 447 U.S. at 536; *accord Pacific Gas & Electric Co. v. Public Utility Commission*, 475 U.S. 1, 20 (1986). As the Court explained in *Boos v. Barry*, 485 U.S. 312, 320 (1988), a content-neutral speech restraint is one that can be "*justified* without reference to the content of the regulated speech." (Emphasis in original, citations omitted).

Applying these principles here, there is no question that the regulation "is justified *only* by reference to the content of the speech," *Boos v. Barry*, 485 U.S. at 321 (emphasis in original); indeed, the very purpose for the restraint is to suppress one category of speech entirely. What is more, the regulation has all of the attributes of a classic content-based restraint: it is a speaker-specific, unqualified ban on in-person solicitation of potential clients by CPAs. The rule forbids speech precisely *because* of its message; CPAs are free to say whatever they want, to whomever they please, whenever they want, *except* they are forbidden by the rule from asking, at all times, places, and manners, a potential client to give them business. In this respect, the ban is indistinguishable from speaker or content-specific restraints that the courts have consistently evaluated under the exacting standards applicable to restraints on speech and have been found unconstitutional. *See Boos v. Barry, supra* (ban on political picketing near embassies); *Shapero v. Kentucky Bar Ass'n*,

supra (ban on targeting mailings by lawyers); *Frisby v. Schultz*, 487 U.S. 474 (1988) (ban on residential picketing); *Police Department of Chicago v. Mosley*, 416 U.S. 171 (1972) (ban on labor picketing). Because the rulings below faithfully applied these precedents, there is no reason for this Court to grant review.

3. Perhaps the most telling flaw in petitioners' presentation is their failure to address the practical significance of this case. That is not surprising, however, because the ruling will both spur competition within the CPA profession and increase the flow of information to the general public about the nature of the services rendered by CPAs and the availability and price of such services. Although petitioners imply that the ruling below could undermine the integrity of the attest process, the facts do not bear petitioners out.

First, the district court's injunction prohibiting the enforcement of the Board's regulation has been in effect for over nineteen months. During that time, Mr. Fane, as well as other CPAs, have been engaged in in-person solicitation of potential clients -- as the Board is aware. Surely, if the Board were genuinely worried about the threat to the attestation process from in-person solicitations by CPAs, it would not have stood idle for so long, but would have promptly sought a stay of the district court's order.

Second, as noted above, Florida is virtually alone in categorically banning in-person solicitation by CPAs. Most of the major commercial states, including New York, Illinois, California, Michigan, Massachusetts, Pennsylvania, for example -- whose commercial establishments rely on the attest function just as heavily as those in Florida -- impose no special restraints on solicitation by CPAs. If there were any substance to the Board's fears that in-person solicitation by CPAs is a breeding ground for fraud, there would be at least some evidence to that effect in those jurisdictions, but the Board has failed to point to any indication that these jurisdictions have experienced a problem.

Third, the Board fails to note that the American Institute of Certified Public Accountants ("AICPA") -- which is the CPA equivalent of the American Bar Association -- has deleted from

its by-laws a prohibition against in-person solicitation. In examining whether a solicitation ban was needed to preserve CPA independence in the attest function, the AICPA issued a lengthy report (R1-23-1) which concluded that "we are unaware of the existence of any empirical data supporting the theory that CPAs . . . are not independent of clients obtained by direct solicitation . . .." Report at 4. The report also noted that, while the Securities and Exchange Commission "has repeatedly recognized that independence is essential to protect the public's reliance on audited financial statements," it "has given no indication since the AICPA eliminated its prior ban on direct uninvited solicitation that it is concerned that this practice will unduly compromise independence in fact or in appearance." *Id.* at 32.

As is evident, petitioners' concerns about the effect of the ruling in Mr. Fane's favor are either misplaced or considerably overstated. Accordingly, this case does not warrant this Court's review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 20, 1992

Supreme Court, U.S.
FILED
JUL 22 1992
OFFICE OF THE CLERK

No. 91-1594

In The

Supreme Court of the United States

October Term, 1992

FRED H. EDENFIELD, *et al.*,

Petitioners,

v.

SCOTT FANE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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Certiorari Granted May 26, 1992

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

SCOTT FANE,

Plaintiff,

v. Civil Case No. 88-10140

BOARD OF ACCOUNTANCY, DEPARTMENT
OF PROFESSIONAL REGULATION;
FRED H. EDENFIELD, JR.;
RICHARD J. ABOUD;
WHIPPLE VAN NESS JONES, JR.;
MARGARET F. STROUPE;
DEAN F. DENISON;
WILLIAM R. MARTIN;
JOSEPH R. MILLSAPS;
ANTONIO L. ARCIZ; and
JEROME A. SCHINE,

In their official capacity
as Members of the Board of
Accountancy

Defendants.

_____)

COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF

1. This action under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution seeks injunctive and declaratory relief prohibiting the defendants from continuing to enforce Fla. Stat. § 473.324(1)(l) (1987) and Fla. Admin. Code Rule 21A-24.002, which forbid Florida Certified Public Accountants from engaging in any direct, in-person, uninvited solicitation in an effort to obtain new clients.

2. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343(3).

3. Plaintiff Scott Fane is a Certified Public Accountant ("CPA") licensed by defendant Board of Accountancy to practice in the State of Florida.

4. Defendant Board of Accountancy ("Board") is an entity within the Florida State Department of Professional Regulation, and is an instrumentality of the State of Florida. The Board's principal place of business is located in Gainesville, Florida. Defendants Fred H. Edenfield, Jr., Richard J. Aboud, Whipple Van Ness Jones, Jr., Margaret F. Stroupe, Dean F. Denison, William R. Martin, Joseph R. Millsaps, Antonio L. Argiz and Jerome A. Schine are members of the Board. The Board is charged with the responsibility of licensing and regulating the practice of CPAs within the State of Florida. It has promulgated and continues to enforce Fla. Admin. Code Rule 21A-24.002, which implements Fla. Stat. § 473.323(1)(l), which forbids CPAs from engaging in direct, in-person, uninvited solicitation. The Board and its members are sued only in their official capacities.

BACKGROUND

5. The State of Florida, through statutes and administrative rules, comprehensively regulates the practice of accountancy by CPAs within the State. See generally Fla. Stat. §§ 473.301 et seq.; Fla. Admin. Code Rules 21.A-24.001, et seq.

6. Fla. Stat. § 473.323(1)(l) provides that CPAs may be subject to disciplinary action for "[e]ngaging in direct, in person, uninvited solicitation of a specific potential

client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the board."

7. Pursuant to its rulemaking authority, see Fla. Stat. § 473.304, the Board has issued a regulation defining what conduct constitutes prohibited "direct, in-person, uninvited solicitation." Under the Board's regulation, "any communication which directly or implicitly requests an immediate oral response from the recipient" constitutes an unlawful solicitation. Fla. Admin. Code Rule 21A-24.002(3). The regulation goes on to specifically state that "[u]ninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited." Id.

8. The statutory provisions and regulations governing practice by CPAs, including the anti-solicitation restraints challenged here, do not apply to accountants.

9. Plaintiff Scott Fane moved in July 1985 from Haddonfield, New Jersey, where he was self-employed, to Homestead, Florida, where he wishes to establish an accountancy practice. In order to do so, he is willing to offer his services at rates below the prevailing market rate for CPAs in the community.

10. Mr. Fane wants to develop a clientele of small to mid-size businesses in the Homestead area, but he is seriously hampered in doing so by the restrictions on direct, in-person, uninvited solicitation set forth in Fla. Stat. § 473.323(1)(l) and Fla. Admin. Code Rule 21A-24.02[sic].

11. But for Florida's restrictions on in-person solicitation by CPAs, Mr. Fane would seek to obtain new clients by

meeting with individuals who own or manage small to mid-size businesses.

12. At such a meeting, Mr. Fane would have the opportunity to describe in full the services that he offers and the price that he would charge. Mr. Fane would explain why he can offer superior service to clients as compared with other CPAs or accountants. Among other things, Mr. Fane would point out that (a) he has ten years of experience as a CPA, with training at Touche, Ross & Co. and Haskins & Sells, both of which are well regarded "big eight" accounting firms; (b) he offers personal service, unlike many competitor CPA firms that use interns, trainees or bookkeepers to handle their clients' affairs; (c) he is willing to tailor his services directly to his client's needs; and (d) he is exceptionally well-qualified, having an accounting degree, a CPA license, a Masters Degree in Taxation and an appointment as an adjunct Professor of Accounting at Miami Dade Community College.

13. Mr. Fane brings this action because Florida's prohibition on in-person, direct, uninvited solicitation, including initial telephone calls, denies him the opportunity to communicate this and similar information to potential clients personally and interferes with his ability to compete with other CPAs and with accountants who are not affected by these restrictions.

CLAIMS FOR RELIEF

14. Florida's restrictions on direct, in-person, uninvited solicitation by CPAs violates the First Amendment to the United States Constitution, made applicable to the State of Florida through the Fourteenth Amendment. Florida's

categorical ban on direct, in-person, uninvited solicitation by CPAs, impermissibly restricts the dissemination of truthful, accurate information relating to a lawful activity, i.e, the provision of accountancy services by a licensed CPA, and the availability and terms of such services. The ban serves no legitimate state interest, and in any event, as a flat prohibition, it is not narrowly drawn.

15. Florida's restrictions on direct, in-person, uninvited solicitation, which are applicable only to CPAs but not to accountants, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, since they single out CPAs alone for discriminatory treatment, and are not even rationally related to any legitimate state interest.

16. Unless the defendant State Board of Accountancy is enjoined from enforcing Florida's prohibition on in-person, direct, uninvited solicitation, plaintiff will continue to suffer irreparable harm.

WHEREFORE, plaintiff prays for an Order

A. Preliminarily and permanently enjoining defendants from enforcing the proscriptions in Fla. Stat. § 473.323(1)(l) and Fla. Admin. Code Rule 21A-24.002, that prohibit Certified Public Accountants from engaging in direct, in-person, uninvited solicitation;

B. Declaring that the proscriptions in Fla. Stat. § 473.323(1)(l) and Fla. Admin. Code Rule 21A-24.002, that prohibit Certified Public Accountants from engaging in direct, in-person, uninvited solicitation violate the First and Fourteenth Amendments to the United States Constitution;

C. Awarding plaintiff his costs and attorneys' fees, pursuant to 42 U.S.C. § 1988; and

D. Granting plaintiff such other and further relief as is just and proper.

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Of Counsel

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

vs. Civil Case No. TCA 88-40264-MP

FRED H. EDENFIELD, JR.;
RICHARD J. ABOUD;
WHIPPLE VAN NESS JONES, JR.;
MARGARET F. STROUPE;
DEAN F. DENISON;
WILLIAM R. MARTIN;
JOSEPH R. MILLSAPS;
ANTONIO L. ARGIZ; and
JEROME A. SCHINE,
In their official capacity
as members of the Board of
Accountancy,

Defendants.

/

ANSWER

Defendants, Fred H. Edenfield, Jr., et al., in their official capacity as members of the Board of Accountancy hereby file this their answer to the Complaint for Injunctive and Declaratory Relief filed in this cause on August 17, 1988 and, pursuant to the stipulation of counsel, the Order of this court dated September 23, 1988 and say:

1. Defendants admit paragraphs 3, 4, 5, 6, 7, 8 of the Complaint.

2. Defendants deny paragraphs 13, 14, 15 and 16 of the Complaint.

3. Defendants are without knowledge as to paragraphs 1, 2, 9, 10, 11 and 12 of the Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing has been forwarded by U.S. Mail to David C. Vladeck and Alan B. Morrison, Public Citizen Litigation Group, Suite 700, Washington, D.C., 20036 and Albert J. Hadeed, Southern Legal Counsel, Inc., 115-A Northeast 7th Avenue, Gainesville, Florida 32601 this 6th day of October, 1988.

JOHN J. RIMES, III
Assistant Attorney General

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,
Plaintiff,
v. Civil Case No. TCA 88-40264-MP
FRED H. EDENFIELD, JR., et al.,
Defendants.

AFFIDAVIT OF SCOTT FANE

1. I am the plaintiff in this action, and I submit this affidavit in support of plaintiff's motion for summary judgment.

2. I am a certified public accountant (CPA), licensed as a CPA in the State of Florida and the State of New Jersey. I hold a Bachelor of Science degree in Accounting from Rutgers, the State University of New Jersey, which was awarded in 1977. I also hold a Masters Degree in Taxation, from the School of Business, Georgia State University, which was awarded in 1979. I was first licensed as a certified public accountant by the State of New Jersey in February 1981. At present, I am also an Adjunct Professor of Accounting at Dade County Community College.

3. I have practiced as an accountant ever since I graduated from College. Thus, in 1977, I was employed as an accountant by American Part Systems, a wholly-owned subsidiary of Gulf & Western Corporation, in Atlanta, Georgia. After obtaining my masters degree in 1979, I was

employed as an accountant, and then as a CPA, for the accounting firm of Touche, Ross & Co., first in Atlanta, and then in Newark, New Jersey. In the Spring of 1981, after having received my CPA license, I left Touche, Ross & Co. and held a number of interim positions. Then, in late 1981, I took a position in the tax department of Deloitte, Haskins & Sells, in Cherry Hill, New Jersey. Thereafter, in early 1983, I joined the CPA firm of Rosenberg & Mincer in New Jersey, where I stayed until late 1984, when I founded my own practice in Haddonfield, New Jersey.

4. In July 1985, I decided to move from New Jersey to Florida, and establish an accountancy practice. I settled in Homestead, Florida, and was licensed as a CPA in Florida in June 1985.

5. With my background and expertise in the field of corporate and commercial taxation, my principle goal in establishing my own practice was to obtain corporate and commercial clients that have sufficiently complex accounting and taxation needs to justify the retention of a highly skilled accountant, preferably on a long-term basis. I have no interest in engaging in direct solicitation to secure individuals as clients, and I certainly have no intention of soliciting individuals either in person or over the telephone in the event I prevail in this litigation. Rather, my efforts to secure clients through direct solicitation are focused exclusively on small and mid-size corporate and other commercial entities.

6. Of course, most businesses already have accountants and CPAs either on retainer, or have developed a relationship with an accountant or CPA so that when the business needs assistance, at tax time, for instance, the

understanding is that the business will ask the accountant or CPA for assistance. Thus, in order for me to obtain clients, I need to persuade businesses that I can offer accounting services that are superior to their present arrangement, either in terms of quality or price or both.

7. The most effective way to persuade any commercial entity to shift its accounting services is to discuss, face-to-face, with a company official both the company's specific needs, and the particular skills and services the CPA can offer. Professional accounting services must be tailored specifically to the needs of each client. It is only through face-to-face discussions that the CPA and the potential client can see whether the services the CPA offers are suited to the needs of the business. For this reason, advertising in newspapers or magazines, or even letters to potential clients, would not assist me in securing clients. Moreover, it is very expensive. In my experience, direct, in-person contact is indispensible in obtaining business.

8. The accounting profession has long recognized this fact. In both Georgia and New Jersey where I was previously employed, and indeed, in most jurisdictions I am familiar with, accountants and CPAs routinely engage in direct, in-person, uninvited solicitation of potential clients. It was commonplace, for example, for a partner at Touche, Ross & Co., or Deloitte, Haskins & Sells, where I was employed, to suggest to a potential client at a professional meeting, social gathering, or even at a country club that the firm could effectively handle the potential client's accounting needs. It was equally commonplace for a partner to directly approach corporations or commercial entities, either in person

or over the telephone, for the purpose of soliciting their business. Typically, a partner would make contact for the purpose of asking that the company entertain a presentation made by a member of the firm -- which is aimed at convincing the company to try the firm's services. There was never even the suggestion that such activities were improper. Insofar as I understand it, neither New Jersey or Georgia law forbids direct, in-person solicitation. Moreover, the major professional association of accountants -- the American Institute of Certified Public Accountants ("AICPA") -- amended its rules in 1979 to delete the then-existing restriction on direct, in-person solicitation. See AICPA, Report of the Special Committee on Solicitation (1981). And, at least since January 1983, the rules of the Florida Institute of Certified Public Accountants have permitted direct, in-person solicitation, provided, or course, that it does not involve the use of false, misleading or deceptive statements. See Rule 502.

9. Indeed, when I founded my accounting practice in Haddonfield, New Jersey, I engaged in precisely these sort of solicitation activities. I would telephone and visit potential clients, and ask that a meeting be arranged during which we could discuss the business's accounting needs, and the particular services I offer.

10. I am advised by my attorney that one possible justification for Florida's categorical bar on in-person, direct, uninvited solicitation is the fear that CPAs, in their quest to obtain business, might engage in deception or misrepresentation, or might compromise their independence in performing public accounting functions. In my view, these are not

legitimate concerns in the accountancy field, especially where the CPA is seeking to secure a long-term commercial client. There are several reasons why these concerns are not well-founded.

A. First, they overlook that the target of this solicitation activity is generally a high-level management official, who is an experienced, hard-headed businessman or woman. They are not easy to deceive, even if an accountant were inclined to do so. Thus, given the CPAs' audience, it strikes me that there is little possibility of misrepresentation or deception.

B. Second, these justifications side-step the fact that CPAs like myself are seeking to establish a long-term relationship with a client; most accountancy work does not relate to one deal or one transaction. Rather, at least as performed by most CPAs who focus on tax matters like myself, accountancy is an ongoing relationship which, if it works well, spans years or decades. It simply makes no sense for a CPA seeking to obtain a long-term client to do so by engaging in misrepresentation or deception.

C. Third, these claims also overlook the nature of the underlying transaction. During any discussion between a CPA and prospective client, the pivotal issues are the client's needs and the CPA's experience, background, and areas of expertise. If there is a fit, then the parties will explore entering into an arrangement. The CPA recognizes, of course, that his or her qualifications are easily verified -- all the prospective client needs do is telephone former employers and current clients. The CPA also understands that most businesses will not hire a new CPA without

checking his or her references extensively. After all, the decision to hire a new CPA is not made lightly. CPAs are privy to all of the business's financial records, and, as a result, know a great deal about the business's strengths and weaknesses. Indeed, it [is] because of the sensitive role a CPA plays for his clients that Florida recognizes that communications between a client and a CPA relating to the client's financial condition are in many circumstances privileged. See Fla. Stat. § 473.316. Understandably, businesses exercise great caution in selecting CPAs, and this only underscores that it would be perilous, at best, for a CPA to misrepresent to a prospective client anything about his or her background, experience, or capabilities.

D. Fourth, this rationale fails to take into account the stringent sanctions the State Board of Accountancy has available to it if an accountant is found to have engaged in misrepresentation or deception in securing clients. Thus, engaging in fraudulent or deceptive conduct in an effort to obtain clients is prohibited by Fla. Stat. §§ 473.323(f) & (k) and is punishable by penalties ranging from license revocation to heavy fines. See Fla. Stat. §§ 473.323(3)(b) & (c). These penalties would further deter any CPA from engaging in deception or misrepresentation to attract clients. To the extent that the defendants argue that the ban on in-person solicitation is needed to ensure that the CPA exercises independence in conducting audits or other public accounting functions, that argument likewise ignores that the Board already forbids a CPA from expressing an opinion "unless he and his firm are independent with respect to such enterprise." Fla. Stat. § 473.315. Again, any violation of this

provision is punishable by license revocation or heavy fines. See Fla. Stat. §§ 473.323(3)(b) & (c).

11. Florida's categorical restriction on direct, in-person, uninvited solicitation has seriously hampered my ability to attract clients and build my practice, for the reasons set forth in paragraphs 7-9, supra.

12. The injury to my practice has been made even more severe by the inequity in Florida's anti-solicitation restriction, which applies only to CPAs. CPAs have many competitors: accountants, bookkeepers, tax preparers, and other financial professionals, all of whom perform many of the same functions as CPAs. They establish financial management systems, prepare financial reports, assist in bookkeeping, manage employee benefits, and prepare tax forms. While Florida does forbid non-CPAs from holding themselves as CPAs, Fla. Stat. §§ 473.322(1)(a) & (b) and from certifying audits and other public financial reports, id. § 473.322(1)(c), it does not limit in any other way the role of non-CPA financial professionals. Accordingly, Florida's solicitation ban discriminates against CPAs, to the advantage of other financial professionals, who can engage in precisely the solicitation activities from which CPAs are forbidden.

• • •

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct. Executed on December 6, 1988, Homestead, Florida.

Scott Fane

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

vs. Civil Case No. TCA 88-40264-MMP

FRED H. EDENFIELD, JR., et al.,

Defendants.

AFFIDAVIT OF LOUIS W. DOONER

My name is Louis W. Dooner. I was born in Tampa, Florida, June 18, 1928, attended local secondary schools and graduated from the University of Florida with a major in accounting in 1953.

Since graduation from college I have been in public accounting except for one year (1957-58) when I was controller of Three Bays Steamship Co., Miami, Florida. My public accounting career began in 1953 when I joined the staff of Price Waterhouse & Co. in New York City. After four years with that firm in their New York, Hartford and Atlanta offices and following one year's absence from the profession I joined the staff of Morris and Grace, a local firm, in Coral Gables, Florida. In December of 1959 I moved to Quincy, Florida, to conduct a practice together with Mr. William D. Bell. This firm practices today under the name of Dooner, Edwards & Fletcher. In 1983 I became inactive in the day to day practice but serve as a consultant to the firm.

On December 27, 1979, I was appointed to the Florida Board of Accountancy and served as Chairman in 1981 and 1982. I was Chairman and/or a member of the Probable

Cause Panel in 1980 and from 1983 to January 5, 1988, when my term on the board expired.

I served as President of the Florida Institute of Certified Public Accountants and also served on numerous committees as a member and/or chairman, including legislative policy and long range planning for which I was named outstanding Committee Chairman. I held numerous offices in both local chapter and state wide.

I have been a member of the American Institute of Certified Public Accountants since 1959 and served as a member of Council (governing body) for seven years and as chairman of numerous committees and task forces, also served as a member of the Auditing Standards Board which promulgates Generally Accepted Auditing Standards and as a member for three years and as chairman for three years of State Legislation Committee.

As a member of the National Association of State Boards of Accountancy I served on numerous committees including the Committee on licensure and reciprocity and Committee on legislation and regulation. I also served as a member of the special committee on relations with government. I designed what has come to be known as the Florida Project whereby the Florida Board of Accountancy and the Regional Inspectors General for federal agencies entered into an agreement of cooperation to better regulate audits of organizations receiving federal funds. This project has now been adopted by and will soon be in place in thirty three states.

In November of 1988 I was named the Distinguished Alumnus of the Fisher School of Accounting, University of

Florida, by Beta Alpha Psi, national honorary accounting fraternity.

I have been asked by defendant in this case to set forth my opinion as to the need and appropriateness of the ban on direct, in-person, uninvited solicitation (rule 21A.24.002). My opinion as set forth below is based upon experiences as a practicing CPA and as a member of the Florida Board of Accountancy.

To more fully understand the ban on direct, in-person, uninvited solicitation by Certified Public Accountants in Florida it will be helpful to look briefly at the history of the profession in the United States.

In the late 1800's investors in England found that in order to be satisfied that their investments in America were being properly managed they enlisted the assistance of accountants to visit the business and report back as to the financial condition and results of operations of these far flung enterprises.

At first these accountants traveled from England, but with travel and communication being as limited as it was in those days it was found that it was far more efficient for the accountants to remain in America and perform the required audit services. Around 1890 the State of New York enacted the first state law to license and regulate Accountants rendering opinions on financial statements based on an audit of the accounting records of the enterprise. These licensees became known as certified public accountants. Their sole purpose was to render opinions on financial statements.

In the early 1900's the Florida legislature enacted a statute which provided for the licensure of qualified persons

to render independent opinions on financial statements of others based on an audit of their accounting records.

Our present accountancy law provides that Certified Public Accountants are the only persons who may render opinions on financial statements of others based on an audit conducted in accordance with Generally Accepted Auditing Standards. The independent opinion on financial statements is the only reason for the existence of a regulated public accounting profession.

As was stated earlier the profession was established for the purpose of auditing financial statements and it has been this function that has become so important to the financial community and to the economy of the United States. Without the independent audit it would be impossible to raise capital with which to finance industry. The profession has done an outstanding job in this area and has come to be one of the most highly respected and trusted professions in this country today.

Part of the development of this highly respected profession was the evolution of a code of conduct which assured the users of financial statements that the CPA who opined on the statements was independent of the subject of the statements and this independence had not been impaired in any way including the solicitation of the client. The auditor's independence means that he is so free of his client that he is willing to report the facts as they are found regardless that it may be detrimental to the client. If he has solicited the client he will be beholden to him.

In order to protect the integrity of opinions on financial statements public accountancy was defined to include all

services rendered to the public by a CPA involving the use of accounting skills. This has meant over the years that the CPA conducted himself in the same manner whether the service was an audit or some other service.

As the volume of other services expanded the strict code of conduct applicable to audits came to be a hindrance to some CPA's who wanted to expand through advertising, solicitation, payment of finder fees and other means. Many of these CPA's have no desire to perform audits and in fact do not. If they were not CPA's they would be free to conduct themselves in any legal manner they choose, rendering all services except audit without the burden of the high standards of the CPA.

The audit function is too important to the economic well being of this country to allow it to be torn down by a few who want the prestige and public trust that their predecessors have earned without being willing to continue to conduct themselves in a manner that will assure the continued integrity of opinions on financial statements. The ban on direct, in-person, uninvited solicitation is for the protection of users of financial statements. It is not to protect the public from solicitors.

It has been suggested that because the American Institute of Certified Public Accountants (AICPA) and the Florida Institute of Certified Public Accountants (FICPA) amended their rules to not prohibit direct, in-person, uninvited solicitation of a potential client, it means that these organizations are not in favor of such a ban. Nothing could be further from the truth. This action was taken initially by the AICPA to avoid action by the United States Department of Justice.

It was the opinion of legal counsel that such a ban by a private organization would not be permitted under the federal antitrust laws.

At the 1980 annual meeting of the AICPA a resolution was passed that called for a special committee to study the question and report back to the 1981 annual meeting which it did in the form of "Report of The Special Committee on Solicitation."

I served on that committee and can assure the court that the recommendations of that committee were not based on the fact that the members were desirous of eliminating the ban on direct, in-person, uninvited solicitation. The committee made five recommendations:

1. The AICPA Code of Professional Ethics should not contain a general prohibition of direct uninvited solicitation of potential clients or a narrower prohibition of oral direct uninvited solicitation of potential clients.

2. Rule 502 of the Code of Professional Conduct should be amended to prohibit certain forms of solicitation, as follows:

   Rule 502--Advertising and Other Forms of Solicitation. A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive. Solicitation by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct is prohibited.

3. The board of directors should issue a policy statement expressing its view that members should exercise appropriate restraint if they elect to engage in the commercial practices of advertising and solicitation.

4. The AICPA should not develop a program to influence state legislatures to adopt more stringent solicitation bans than the AICPA itself can impose.

5. The AICPA should not require its members to file with the AICPA copies of all direct uninvited promotional literature simultaneously with, or within a reasonable time after, its dissemination to potential clients.

As can be seen from the foregoing quotations from the Report of The Special Committee on Solicitation the primary concern of the committee was the affect on the AICPA and not the merits of the issue from the standpoint of the public interest. We were very much concerned that if action was taken by the FTC and the AICPA were require[d] to sign a consent agreement it would contain a proscription against ever making an utterance on the subject as had occurred in the past with regard to prohibition on competitive bidding. It was felt that we would be better off to not have the ban and have the ability to speak on the subject than to not have the ban and not have the ability .pa[sic] to speak on the subject.

The ban on direct, in-person, uninvited solicitation is extremely narrow and only proscribes the uninvited contact whereby the potential client is required to make a response. It may be helpful to look at what is permitted under this rule.

1. May a CPA attend trade shows, luncheon clubs and other such meetings and engage in direct, in-person, solicitation?

Yes, because those in attendance by their presence, have issued an invitation to be solicited.

2. May a CPA send a personal letter to a potential client requesting an appointment to discuss his qualifications to render services?

Yes, because the decision to enter into the conversation rest[s] with the potential client.

3. May a CPA send brochures and other advertising material to a particular member of management of a potential client?

Yes, this activity as in the previous example places the responsibility for initiating personal contact with the potential client.

The only type of solicitation that a CPA may not engage is that that places the potential client in the position of having to make an immediate oral response thus opening the door to overreaching and vexatious conduct by the CPA or conversely, and far more damaging to society, the opportunity for the potential client to place the soliciting CPA in a compromising position as part of the bargain reached since the CPA is obviously in need of business and may be willing to bend the rules. Such activity is not in the best interest of the public which is so dependent on independent opinions on financial statement[s] based on an audit conducted in accordance with generally accepted auditing standards.

* * *

Pursuant to 28 U.S.C. paragraph 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct. Executed on January 4, 1989, Quincy, Florida.

_____

Louis W. Dooner

STATE OF FLORIDA
COUNTY OF GADSDEN

On this 3rd day of January, 1989, before me, personally appeared LOUIS W. DOONER, to be known and known to me to be the person described in and who executed the above instrument and acknowledged to me that he executed the same.

Deborah G. McMillan
NOTARY PUBLIC

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

vs. Civil Case No. TCA 88-40264-MMP

FRED H. EDENFIELD, JR., et al.,

Defendants.

SUPPLEMENTAL AFFIDAVIT OF SCOTT FANE

1. I am the plaintiff in this action, and I submit this supplemental affidavit in further support of plaintiff's motion for summary judgment.

2. I have carefully read both the memorandum that the defendants filed in opposition to my motion for summary judgment and the affidavit of Mr. Louis W. Dooner, and I believe that there are two points that require clarification.

3. First, contrary to the impression that might be drawn from defendants' submissions, there are many CPAs in active practice who rarely, if ever, exercise the attest function. Generally, the attest function is employed to verify the accuracy of financial statements used to raise capital--either from lending institutions or investors. Thus, CPAs engaged in the preparation or audit of such financial statements regularly "attest" to their accuracy. On the other hand, accountants like myself who specialize in corporate and individual tax seldom, if ever, exercise the attest function. This is also true in a number of other areas in which other CPAs specialize: financial planning, employee

benefits, computer consulting, management information systems, estate planning and litigation support.

4. Thus, while the ability to attest to the accuracy of financial statements and audits is one factor that distinguishes CPAs from accountants and other financial professionals, it is only one of many factors, several of which may be even more important. To start with, CPAs alone are licensed, and hence have demonstrated their educational background, competence, expertise, and good moral character. Moreover, CPAs must take continuing education courses in accounting, and, for that reason, must maintain a high level of professionalism. Finally, certain communications between CPAs and their clients are privileged under Florida law, which is a critical distinction between CPAs and accountants. Most corporate clients, and many individual clients (particularly those who are wealthy), rely heavily on the fact that discussions with their CPAs are entirely confidential, and the ability to assure confidential handling of sensitive financial information is often the cornerstone of a CPA's relationship with a client.

5. Second, defendants' submissions can also be read to imply that a face-to-face solicitation, where the prospective client plays no role in initiating the conversation, is somehow fraught with the danger that in such circumstances a CPA might be willing to surrender his independence in order to secure business, and, conversely, a business may be inclined to attempt to entice a CPA to compromise his integrity. Indeed, defendants even suggest that a CPA engaged in solicitation may be more "willing to bend the rules" than CPAs who do not solicit.

6. Having practiced as a CPA and accountant in jurisdictions that do not prohibit direct, uninvited solicitation, I have extensive experience with in-person, direct, uninvited solicitation of clients by CPAs. I have engaged in such soliciation [sic] myself when I was in solo practice, and I have been employed at CPA firms--including two major, national firms--that also engaged in such solicitation. I am unaware of any instance in which, during the course of such solicitation, a CPA offered to give-up his independence to secure a client or a business sought to entice a CPA to compromise his integrity by promising to send the CPA its work. In light of my experience, and in my professional opinion, that scenario is inherently implausible. To start with, there are powerful deterrents against such conduct by CPAs. Improperly exercising the attest function may well constitute fraud, which is both a crime and an intentional tort, and thus a CPA would be risking jail and financial ruin by knowingly engaging in such conduct. Moreover, if caught, the CPA would likely be stripped of his license, and subjected to public humiliation. For these reasons, CPAs are exceedingly careful before attesting to the accuracy of any financial information. Second, while a CPA engaged in direct solicitation is certainly seeking new business, generally his major interest is in securing long-term clients. Any businessman interested in obtaining a "clean" but undeserved financial opinion is, by definition, not a promising client.

7. While the defendants imply that the lack of familiarity between a CPA and potential client might be some sort of breeding ground for improper conduct, in my

experience, and based on my professional opinion, the opposite is true. The only situation in which I can imagine a CPA compromising his independence is where a long-term client, with whom the CPA has developed a close relationship, is in serious trouble and needs a "clean" financial opinion. Perhaps in those circumstances a CPA might be persuaded to bend the rules to help his client. Even in those circumstances, however, most CPAs would place their independence above the needs of their client, if for no other reasons than the enormous risks that giving a false certification would carry.

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Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct.

Scott Fane

Executed on: January 25, 1989

REPORT OF THE SPECIAL COMMITTEE ON SOLICITATION*

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*Prepared by the American Institute of Certified Public Accountants ("AICPA").

Foreword

In early 1979, in the light of legal advice questioning the legality of the longstanding prohibition against direct uninvited solicitation and the prospect that the ban would be challenged by the United States Department of Justice, the membership of the American Institute of CPAs voted in a mail ballot to eliminate the ban. Developments since the lifting of that prohibition caused concern that the members of the profession were engaged in promotional practices that were detrimental to both the general public and the profession. This concern prompted a member at the AICPA's annual meeting on October 6, 1980, to introduce the following resolution:

WHEREAS, direct uninvited solicitation by certified public accountants is detrimental to the public interest and to the professional practice of accountancy, as it tends to diminish the Technical and Ethical Standards of the public accounting profession, and

WHEREAS, various state boards of accountancy and various state societies maintain prohibitions on direct uninvited solicitation, and

WHEREAS, certain state boards of accountancy have instituted proceedings against accounting practitioners who have violated these rules on direct uninvited solicitation, now, therefore, be it

RESOLVED, that the Chairman of the American Institute of Certified Public Accountants shall appoint a special committee to study the ramifications of the present status of rules pertaining to direct uninvited solicitation and the legality of such rules. The special committee shall consist of members from all segments of the membership in public practice. The special committee shall be empowered to request legal counsel of its own choosing, shall be empowered to communicate with state boards and state societies, and shall report its findings in a written report to the members of the American Institute of Certified Public Accountants at least one month prior to the AICPA Annual Meeting in 1981.

The resolution was adopted by an overwhelming majority of those present and became the charge to the Special Committee on Solicitation that was appointed the following month.

To provide a broad spectrum of professional experiences and views, the committee was composed of members from small, medium-sized, and national CPA firms, one member from industry and one member who was the executive director of a state CPA society. All members participated fully in the committee's activities and deliberations.

At its first meeting the committee decided that its research would be conducted most expeditiously through small working groups of its members. Six meetings of the full committee were held to deliberate the findings of the working groups' research and to arrive at the committee's conclusions and recommendations. The committee's research methodology is set forth in the section of this report titled "Research and Findings."

We suffered an incalculable loss in the death of our initial chairman, William R. Gregory. In his speeches as chairman of the board of directors in 1980 and in other writings, he continually decried what he saw to be a trend away from professionalism and toward commercialism. He believed the inevitable result would be a decline in the

profession's prestige and image in the eyes of the public. He viewed acts of direct uninvited solicitation as manifestations of that trend. His guidance as chairman in the early period of our work provided direction for our study and aided immeasurably in our completing our assignment in a timely manner. We acknowledge his significant contribution to our project.

Special Committee on Solicitation
William R. Gregory, Chairman
(November 20, 1980 to April 12, 1981)
Alan Brout, Chairman
(April 12, 1981 to conclusion)
Norman E. Auerbach
Louis W. Dooner
Charles R. McCann
A. Clayton Ostlund
Clinton J. Romig
Mahlon Rubin
Gordon H. Scheer
Jay T. Ward

Donald J. Schneeman, *General Counsel and Secretary*
William C. Bruschi, *Vice President--Review & Regulation*

September 1981

Recommendations

In arriving at our recommendations, we considered extensively the opinion and advice provided by legal counsel and the significance of the information obtained from our surveys of the AICPA membership, state societies, and boards of accountancy. The comments volunteered by interested members were also considered.

We conducted our study knowing, of course, that the AICPA membership had decided in a 1979 mail ballot to delete from the Institute's Code of Professional Ethics the prohibition against direct uninvited solicitation. Although that ballot, as is customary with such ballots, did not ask for the reasons members voted as they did, we believe that many voted to lift the ban to forestall antitrust action against the AICPA because they felt that the AICPA would have little chance of winning.

Our survey of the attitudes of AICPA members toward direct uninvited solicitation, described in this report, disclosed that a substantial number of members now believe that, were it legal to do so, the AICPA should reverse that 1979 decision and install and enforce a ban on direct uninvited solicitation. Responses revealed that many members are convinced that direct uninvited solicitation undermines the professionalism of CPAs. They are apprehensive of the impact of unbridled solicitation upon the public image of CPAs. While we share such concerns, nevertheless, the cold reality of today's business and legal environment must be recognized.

Through the 1970s, the professions, including CPAs, functioned largely in a self-governing environment. Since

then, the United States Supreme Court has made it clear that the learned professions are not exempt from the antitrust laws. Subsequent actions by federal and state authorities and court decisions have opened the way to sharply competitive practices among professionals.

Therefore, in response to the directive set forth in the 1980 Annual Meeting resolution, and after due consideration and discussion of our findings and the opinion provided by legal counsel, we make the following recommendations:

1. ***The AICPA Code of Professional Ethics should not contain a general prohibition of direct uninvited solicitation of potential clients or a narrower prohibition of oral direct uninvited solicitation of potential clients.***

In arriving at this recommendation, we were strongly persuaded by the opinion of legal counsel that such prohibitions would run a substantial antitrust risk. In all likelihood, the Justice Department would institute an antitrust action challenging the ban. Such a suit was recommended in August 1978 by the department's antitrust staff when the AICPA Code of Professional Ethics prohibited direct uninvited solicitation. The recommendation was aborted only after the AICPA's membership voted in March 1979 to eliminate the prohibition. The AICPA's prominent position in professional circles and the publicity that would follow adoption of the ban would undoubtedly focus the attention of the Justice Department once more on the AICPA.

The prevailing attitude of the Justice Department was expressed in September 1979 when the chief of the antitrust division's special litigation section stated that, in the Justice Department's view, a blanket ban on written and oral solicitation by accountants "substantially impedes the

ordinary give and take of the marketplace and under cases like [*Professional Engineers, Texas State Board of Public Accountancy, and American Institute of Architects*] would be illegal under the antitrust laws absent the state-action exemption."[1]

Counsel also points out that the trend of case law and the absence of persuasive evidence that direct uninvited solicitation by CPAs is likely to lead to false or misleading claims or oppressive conduct make it unlikely that the ban would be upheld in a judicial proceeding. While we do not want to toss in the towel in a legal fight before it begins, nevertheless, the realities of the profession's situation must be recognized.

To the likelihood that the AICPA would not prevail in a court suit must be added the financial burden that would be incurred by the AICPA. Counsel advises that the legal cost of such a suit would be in excess of $1 million. While we acknowledge that the AICPA should not flinch at legal fees for a cause that is likely to succeed, an expenditure of substantial sums is unwarranted when there is little chance of success.

Another potential cost to the AICPA could be the loss of its present ability to speak in a negative tone on the subject of, or to issue cautionary guidance to its members in, the

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[1]Letter, J.W. Poole to P.M. Bluhm, Vermont legislative draftsman (September 7, 1979). The "state-action exemption" is a doctrine that confers immunity from antitrust law for a restraint of trade which is clearly articulated and affirmatively expressed as state policy and is actively supervised by the state itself. For further discussion, see the legal opinion of Kaye, Scholer, Fierman, Hays & Handler, Appendix C, page 71, herein.

matter of solicitation practices. It is commonplace for court decisions in injunctive actions not only to order curtailment of the offending practice but to outlaw otherwise lawful practices in order to achieve what the court regards as effective relief. Indeed, the AICPA has already been a victim of this judicial doctrine as a result of the consent decree it entered into on July 1, 1972, to settle a suit seeking to eliminate former rule 303 of the Code of Professional Ethics, which prohibited competitive bidding.[2]

Yet another cost--intangible in nature--could be the profession's loss of prestige in the event of an adverse decision. The AICPA's failure to sustain in court its policy position that the ban on solicitation is in the public interest could lead the public to conclude that the ban was designed to serve the profession's interests alone. CPAs enjoy a reputation as objective, conservative, public-intentioned professionals. An adverse decision in a legal proceeding in which the public interest is an issue could tarnish the profession's image.

During our study we were cognizant of the arguments advanced by some members that a ban on direct uninvited solicitation could be justified on the grounds that the unique requirement for CPAs to be independent in audit and review engagements could be the basis for justifying the ban under antitrust law. The supporting argument was that a CPA who obtained a client through direct uninvited solicitation would

[2]United States v. American Institute of Certified Public Accountants, Inc., 1972 Trade Cas. ¶74,007 (D.D.C. 1972).

not have the requisite objectivity of mental attitude required for a CPA's independence of the client.

We were also aware of the theory advanced by Philip L. Defliese, past chairman of the AICPA Board of Directors, that the independence in mental attitude of an incumbent auditor could be impaired if, during the course of an audit engagement, the auditor becomes aware that the client is being solicited by another auditor. Mr. Defliese expressed his theory as follows:

> The independent auditor's position is unique in that he has two clients--the company he is auditing and the person relying on his opinion on the financial statements: the prospective investor or general public. Only through an independent approach to his task can the reliability of his opinion be assured. The threat of the loss of an engagement, or the need to lower his fee (and possibly impair quality), while he is so engaged may consciously or subconsciously affect his independent attitude toward the management he is auditing. This can injure the public interest.[3]

While we know that those theories on the impact of solicitation on independence have some support in professional circles, we have concluded that there is no practical way to prove their validity.

We were advised that the argument that a ban on direct uninvited solicitation of audit clients is needed to assure auditor independence was advanced by AICPA representatives in discussions in 1978 with the Justice Department's

[3]Letter, Philip L. Defliese to State Board for Public Accountancy, the University of the State of New York (November 26, 1980).

antitrust division. The argument was rejected in the absence of empirical data.[4]

The survey of boards of accountancy brought to our attention correspondence between the Vermont State Board of Accountancy and the Vermont Attorney General. In that correspondence, the Vermont board argued that its rule 5.17 "restricting solicitation is based on the need for independent auditors to maintain an absolute independence in fact and in appearance."[5] The argument was rejected by the Vermont Attorney General's office as follows:

> It is our opinion that Rule 5.17 may violate both the antitrust laws and the First Amendment. Although it is impossible to say with absolute certainty how a court would decide if faced with these issues, we believe that the trend of recent cases strongly suggests that it would strike down the regulation on both antitrust and constitutional grounds.[6]

We are unaware of the existence of any empirical data supporting the theories that CPAs (a) are not independent of clients obtained by direct uninvited solicitation or (b) do not maintain their independence in mental attitude toward those clients subjected to direct uninvited solicitation by another

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[4]Even if such data were available, the committee's legal counsel advises that it would not justify a total prohibition of direct uninvited solicitation, oral or written, but only a narrow ban on solicitation of audit and review engagements.

[5]Letter, Roderic A. Sherman, chairman, Vermont State Board of Public Accountancy, to Jay I. Ashman, Vermont Assistant Attorney General (August 20, 1979).

[6]Letter, Jay I. Ashman, Vermont Assistant Attorney General, to P.M. Bluhm, Vermont Legislative draftsman (September 6, 1979).

CPA. We have heard allegations by some CPAs that the independence of CPAs would be impaired under those conditions, but many CPAs do not agree that their own independence would be impaired.

Furthermore, our survey of members' attitudes disclosed that a preponderance of the AICPA membership believes that direct uninvited solicitation to acquire clients does not impinge on the independence of CPAs. The survey disclosed that 11 percent were in "total agreement" with the proposition that impairment occurred, whereas 34 percent were in "total disagreement."

Some contend that solicitation results in substandard work by CPAs who short-cut audit standards or skirt generally accepted accounting principles. The AICPA Rules of Conduct require adherence to generally accepted auditing standards and generally accepted accounting principles no mater how the client is acquired. The technical performance of CPAs is subject to investigation and evaluation regardless of the presence or absence of a ban on direct uninvited solicitation.

2. ***Rule 502 of the Code of Professional Conduct should be amended to prohibit certain forms of solicitation, as follows:***

   Rule 502--Advertising and Other Forms of Solicitation. A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive. *Solicitation by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct is prohibited.* (Amendment in italics).

A legitimate concern of the AICPA is the prohibition of unscrupulous solicitation practices. This proposed amend-

ment would ban solicitation activities of a nature that are detrimental to the public and to the profession. While instances of such solicitation may be rare, we have concluded that the prohibition would be useful.

Legal counsel advises that the amendment is likely to pass antitrust muster. Prohibitions of this type have been adopted and retained by some boards of accountancy even though a few of those boards are being required to eliminate broader solicitation bans on advice of their respective attorneys general.

3. ***The board of directors should issue a policy statement expressing its view that members should exercise appropriate restraint if they elect to engage in the commercial practices of advertising and solicitation.***

The relaxation of ethics rules pertaining to solicitation, including advertising, has resulted in increasing competition within the profession to acquire and retain clients. Excesses in those practices could cause the public's perception of the profession to change and the profession to suffer a serious loss of stature.

A policy statement issued by the board of directors would be a constant reminder of the possible consequences of rampant direct uninvited solicitation. At the same time the statement would make clear that direct uninvited solicitation practices not prohibited by rule 502 do not violate the AICPA Code of Professional Ethics and that no member will be disciplined for engaging in such conduct.[7]

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[7]Rule 502, Advertising and Other Forms of Solicitation, reads as follows: "A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false,

Legal counsel advised that a nonenforceable policy statement of this type would not create a substantial antitrust risk since the board of directors has a right to express its opinion on the subject; nevertheless, it must be left to each member to decide what his course of action should be.

4. ***The AICPA should not develop a program to influence state legislatures to adopt more stringent solicitation bans than the AICPA itself can impose.***

In the opinion of legal counsel, the AICPA or a state CPA society would encounter little antitrust risk were it to petition state legislatures to enact statutes banning direct uninvited solicitation, and, since the resultant restraint would be the product of state action, it would be exempt from antitrust prohibitions.

Despite the allure of such legislatively enacted bans, we believe that the political climate would preclude state legislatures from passing such laws. We are also persuaded by counsel's opinion that such bans, if enacted by legislatures, would probably not survive constitutional challenge if applied to nondeceptive, noncoercive instances of solicitation.

5. **The AICPA should not require its members to file with the AICPA copies of all direct uninvited promotional literature simultaneously with, or within a reasonable time after, its dissemination to potential clients.**

Having been advised by legal counsel that such a requirement will not pose a significant antitrust risk, we gave serious consideration to establishing such a procedure but concluded that such a requirement would impose highly

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misleading, or deceptive."

unpopular "red tape" procedures upon AICPA members. In our opinion, if the AICPA were to adopt this filing requirement, it would result in the creation of a new bureaucratic organization to sift through large quantities of paper for relatively few violations. We do not believe that the benefits derivable from such a program would warrant the considerable additional cost incurred.

Currently, the AICPA has the capability to deal with direct uninvited promotional practices that may be false, misleading, or deceptive through enforcement of rule 502, which prohibits those forms of solicitation. The AICPA Professional Ethics Division can deal with complaints filed under rule 502 and has the staff to do so.

Research and Findings

Research Methodology

At the outset of our study, we determined that the information needed for our deliberations could be obtained from research in the following areas:

- The evolution of the AICPA Rules of Conduct pertaining to solicitation.
- The current status of state CPA society prohibitions against direct uninvited solicitation.
- The current status of board of accountancy prohibitions against direct uninvited solicitation.
- The attitude of the AICPA membership towards direct uninvited solicitation.
- Current legal opinion regarding the various possible courses of action relative to solicitation rules.

To obtain general reactions of AICPA Council members to the committee's project, the agenda for the winter

regional meetings of Council members provided for discussion of our activities. In addition, Chairman Alan Brout reported some of our tentative conclusions at the spring meeting of Council.

Publicity attached to the formation and appointment of our committee resulted in a number of letters from members giving their views on direct uninvited solicitation.

Evolution of AICPA Ethics Rules Pertaining to Solicitation

The AICPA Code of Professional Ethics contains a rule against solicitation by false, misleading, or deceptive statements. The code has had rules pertaining to solicitation since the adoption of the first code in 1917. The wording of those rules was changed from time to time as the need was identified in ethics enforcement activities and in view of changed conditions. This brief history was prepared to provide an awareness of the evolution of the rules pertaining to solicitation.

In 1917, Council of the American Institute of Accountants, a predecessor organization to the AICPA, adopted the eight rules of conduct that constituted the Institute's initial Code of Professional Ethics. Rule 8 imposed a ban on solicitation of clients with the following language:

> No member shall directly or indirectly solicit the clients nor encroach upon the business of anpther member, but it is the right of any member to give proper service and advice to those asking such service or advice.

The creation of an associate class within the AIA membership led to a revision of the rule, which was adopted by a vote of the membership in 1941. The revised rule read:

> A member or an associate shall not directly or indirectly solicit the clients or encroach upon the practice of another public accountant, but it is the right of any member or associate to give proper service and advice to those asking such service or advice.

These two early rules prohibited solicitation of clients of other members or public accountants but were silent regarding solicitation of potential clients that had no existing professional commitments or understandings. The membership, by a vote in 1948, broadened the rule to apply the ban to all potential clients. The new rule also provided additional guidance and was worded as follows:

> A member shall not directly or indirectly solicit clients by circulars or advertising, nor by personal communication or interview not warranted by existing personal relations, and he shall not encroach upon the practice of another public accountant. A member may furnish service to those who request it.

The membership next decided, effective March 6, 1962, to separate the one rule into two, one pertaining to solicitation and the other to encroachment, as follows:

> 3.02. A member or associate shall not directly or indirectly solicit clients by circulars or advertisements, nor by personal communications or interview, not warranted by existing personal relationships.
>
> 5.02. A member shall not encroach upon the practice of another public accountant. A member or associate may furnish service to those who request it.

The ban on solicitation was made all-encompassing by the following rule adopted by the membership as of March 3, 1964:

> A member or associate shall not endeavor, directly or indirectly, to obtain clients by solicitation.

In a restatement of the AICPA Code of Professional Ethics, approved by the membership and effective March 1, 1973, bans on solicitation and advertising were combined as one rule. (The code had rules controlling or banning advertising dating back to 1919.) The new rule was this:

> Rule 5.02--Solicitation and Advertising. A member shall not seek to obtain clients by solicitation. Advertising is a form of solicitation and is prohibited.

The United States Supreme Court decisions in the *Goldfarb* case in 1975 and the *Bates* case in 1977 caused the AICPA to review the foregoing rule. Following the recommendations of the task force on advertising, a membership referendum was held that resulted in the adoption in 1978 of the following narrower rule:

> Rule 502--Advertising and Other Forms of Solicitation. A member shall not seek to obtain clients in a manner that is false, misleading, or deceptive. A direct uninvited solicitation of a specific potential client is prohibited.

As far back as 1973, the AICPA's advertising, solicitation, and encroachment rules had been the subject of an inquiry by the United States Department of Justice. The department did not contest the proposition that a rule prohibiting only "false, misleading, or deceptive" advertising conformed to existing law. The department, however, objected to the second sentence of the rule, which prohibited direct uninvited solicitation, since the resultant ban was not limited by the "false, misleading, or deceptive" standard.

In view of that objection and upon advice from AICPA legal counsel that it was doubtful the ban could be successfully defended, Council authorized, by a vote of 106 to 103, a mail ballot of the membership to repeal the prohibition

against direct uninvited solicitation by deleting the second sentence of the rule. To avoid any implication that Council was recommending a favorable vote of the membership on the proposed change, Council members requested that their feelings on the merits be recorded. Their vote was recorded as 130 against the proposed change and sixty-nine in favor.

The subsequent mail ballot of the membership resulted in a vote in favor of the proposed change. A total of 71,271 members participated in that ballot, representing 49 percent of the membership. Of those, 48,961 (68.7 percent) voted to delete the ban on direct uninvited solicitation. Accordingly, as of March 31, 1979, the following rule went into effect and is in effect at the date of the preparation of this report:

> Rule 502--Advertising and Other Forms of Solicitation. A member shall not seek to obtain clients in a manner that is false, misleading, or deceptive.

Court cases involving the legal issues we studied continue to arise, and AICPA monitors the resultant court opinions for their impact upon AICPA policy. One such case, which the United States Supreme Court has agreed to consider, captioned "*In the Matter of R.M.J.*," is an appeal of a Missouri Supreme Court decision and could define the limits of state power to regulate lawyer advertising.

State CPA Society Rules

To obtain knowledge of existing prohibitions against direct uninvited solicitation of potential clients in state society codes of ethics and other pertinent information, a survey questionnaire was distributed to the fifty-four CPA societies (the fifty states and the four other licensing

jurisdictions: District of Columbia, Guam, Puerto Rico, and the Virgin Islands).

A total of forty-six CPA societies responded to the questionnaire. An analysis of the responses revealed that five had bans on direct uninvited solicitation; one of the five, on the advice of legal counsel, was not enforcing its ban. Forty-one had lifted bans either through the application of a provision in their bylaws for automatic adoption of changes in the AICPA Code of Professional Ethics or through referendums of their memberships. In all societies that conducted referendums, the memberships voted to lift the bans.

Boards of Accountancy Rules

A questionnaire similar to that mailed to CPA societies was mailed to the fifty-four boards of accountancy to obtain knowledge of their prohibitions against direct uninvited solicitation of potential clients and other information.

Fifty-one boards responded to the survey. Twenty-eight boards stated that they had no prohibitions against solicitation or prohibited only false, misleading, or coercive statements. Twenty-three had prohibitions not limited to false, misleading, or coercive statements.[8] The majority of the boards having prohibitions have adopted the full rule of conduct pertaining to solicitation which was promulgated in 1977 by the National Association of State Boards of Accountancy (NASBA) in its Model Code of Professional

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[8]Since the survey was made, one board has suspended enforcement of its ban and two other boards have dropped their bans.

Conduct. The full NASBA rule pertaining to solicitation and the related rule on advertising are set forth as exhibit A.

The attorneys general in three states with prohibitions in effect have objected to the prohibitions. Two of those boards are moving toward elimination of their prohibitions.

In the states with the full NASBA rule in effect, the attorneys general in three states have objected to part (c) of the rule. In addition, the chief of the Justice Department's antitrust division special litigation section took the position that part (c) of rule 404 would be illegal under antitrust law unless it resulted from valid state action that would give rise to antitrust exemption.[9] The committee is aware of only one state that has incorporated a ban against direct, in-person, uninvited solicitation into its accountancy statute to assure against antitrust attack.

Attitudinal Survey on Solicitation

To obtain information about the attitude of AICPA members toward direct uninvited solicitation, a survey was made of the AICPA membership. Gary Siegel, Ph.D., CPA, a member of the faculty of DePaul University and experienced in conducting attitudinal surveys including those of CPAs, was engaged as consultant to the committee for this project. Attached as Appendix B is a copy of the survey questionnaire.

The survey questionnaire was sent to a random sample of the AICPA membership, stratified according to types of employment, that is, national CPA firms, medium-sized or

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[9]Letter, J.W. Poole to P.M. Bluhm, Vermont legislative draftsman (September 7, 1979).

local CPA firms, industry, government, education, and other. A total of 2,519 questionnaires were mailed, and we received 698 usable responses. In the opinion of Professor Siegel, the number of responses was large enough to warrant reliance upon the validity of the resultant data.

Professor Siegel's summary report of his analysis of the questionnaire data is attached as Appendix A. A detailed report of the analysis of the data is available from the AICPA Order Department upon request.

The committee believes that the most significant conclusions to be drawn from the data are the following:

1. There is widespread objection to the general practice of direct uninvited solicitation of potential clients.
2. Opinions vary regarding what actions constitute direct uninvited solicitation.
3. A majority believes that the AICPA Code of Professional Ethics should, if legally permissible, prohibit direct uninvited solicitation.
4. A substantial majority believes that direct uninvited solicitation does not lower the quality of services performed by CPAs.
5. A substantial majority also believes that direct uninvited solicitation does not impair independence in fact.
6. The attitudes of the members are generally the same regardless of their types of employment or geographic location. A difference was noted among members in public practice, however, in the attitudes of partners and sole practitioners compared to staff members. A similar correlation was found in terms of number of years the respondents were in public practice. The staff members and those with a lesser number of years of practice are somewhat more permissive in their attitudes toward direct uninvited solicitation and what acts constitute that practice.

Selection of Special Legal Counsel and Delineation of Charge

Selection of Special Legal Counsel

The committee recognized that its recommendations would be influenced by the advice of its legal counsel regarding what is legally feasible under antitrust laws and recent court decisions. Also, the committee took into account the recommendation of the AICPA Special Committee on Small and Medium-Sized Firms that the Institute engage outside counsel who has not previously advised the Institute on the impact of the antitrust laws on an ethics rule prohibiting direct uninvited solicitation.[10]

Accordingly, the following additional criteria were set for the selection of special legal counsel:

1. The firm must be recognized as an authority on antitrust law.
2. The firm should have a feeling for and knowledge of the environment and problems of the accounting profession and professional associations.
3. Firms that have provided legal services for major accounting firms would not be precluded from consideration except for those law firms that are the "lead" firms for major accounting firms.
4. The location of the firm was not critical, but a New York or Washington, D.C., firm would have easy access to the committee and staff.

After considering a number of firms, we selected Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., and

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[10]Report of the Special Committee on Small and Medium-Sized Firms (New York: AICPA, 1980) p.23.

Stanley D. Robinson, a member of that firm, as our committee legal counsel.

Delineation of Charge

Mr. Robinson met with members of our committee to discuss the committee's assignment and to identify issues he might consider in developing his legal opinion. Those issues were presented as the following questions:

1. Can the prior broad rule prohibiting oral and written solicitation be reinstated in the AICPA Code of Professional Ethics?
2. If not, what is the broadest rule banning solicitation that can be established by the AICPA?
   a. Can oral solicitation be banned?
   b. Can solicitation of audit and review engagements be banned on the theory that the CPA's independence would otherwise be impaired?
3. If none of the foregoing can be accomplished, can the AICPA issue a nonenforceable policy statement outlining its views with respect to direct uninvited solicitation?
4. Can the AICPA seek to obtain a provision by state legislatures or boards of accountancy prohibiting direct uninvited solicitation, and would such a provision, if adopted, be enforceable? A summary of the firm's legal opinion is attached as Appendix C. The full legal opinion may be obtained from the AICPA Order Department upon request.

Exhibit A

National Association of State Boards of Accountancy

Extracts from Model Code of Professional Conduct Rules Pertaining to Solicitation and Advertising

Rule 404--*Solicitation.* A licensee shall not by any direct personal communication solicit an engagement to perform professional services (a) if the communication would violate Rule 403 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication or is seeking to secure the performance of professional services and has not yet engaged another to perform them.

COMMENT: The Comment following Rule 403 is applicable here as well. It is reasonably clear that rules regarding solicitation may be tested by somewhat different legal criteria than those dealing with advertising; and accordingly, a separate rule seems called for.

Rule 403--*Advertising.* A licensee shall not use or participate in the use of any form of public communication having reference to his professional services which contains a false, fraudulent, misleading, deceptive or unfair statement or claim. A false, fraudulent, misleading, deceptive or unfair statement or claim includes but is not limited to a statement or claim which:

A. Contains a misrepresentation of fact; or

B. Is likely to mislead or deceive because it fails to make full disclosure of relevant facts; or
C. Contains any testimonial or laudatory statement, or other statement or implication that the licensee's professional services are of exceptional quality; or
D. Is intended or likely to create false or unjustified expectations of favorable results; or
E. Implies educational or professional attainments or licensing recognition not supported in fact; or
F. States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy, if this is not the case; or
G. Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or
H. Contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

COMMENT: This Rule would be a marked departure from the common pattern of existing rules, which flatly ban all advertising. It is intended to reflect the current state of the law as to constitutionally permissible restrictions on advertising, as best it can be divined from the United States Supreme Court's decision in Bates v. State Bar of Arizona.

APPENDIX A

Results of the Attitudinal Survey on Direct Uninvited Solicitation

Summary Report
July 1981

Prepared for the Special Committee on Solicitation
American Institute of Certified Public Accountants

Conducted by
Gary Siegel, Ph.D., CPA.

Attitudinal Survey on Solicitation
Gary Siegel, Ph.D., CPA

Summary Report

The purpose of this study was to discover the opinions held by AICPA members toward direct uninvited solicitation of potential clients. Specifically, the committee sought to discover member viewpoints on (a) what constitutes direct uninvited solicitation, (b) how direct uninvited solicitation affects the public and the profession, (c) the relationship between solicitation and other forms of promotion, and (d) what to do about direct uninvited solicitation.

To achieve the study's objectives, the principal investigator developed a questionnaire based on input from the AICPA Special Committee on Solicitation. Two survey research professionals reviewed the questionnaire, and it was pre-tested on a sample of CPAs. After necessary modifications, the final version was mailed to a stratified random sample of 2,519 members of the American Institute of Certified Public Accountants in February 1981.

The questionnaires, together with a cover letter explaining the purpose of the study, were mailed without any respondent identification information to preserve anonymity. Thus, we did not know who completed the questionnaire, nor were we able to send follow-up questionnaires to nonrespondents. However, the possibility that respondent opinions differ from those of nonrespondents and, therefore, are not representative of all AICPA members is considered unlikely because of the wide divergence of viewpoints expressed by this large sample. Moreover, there is no basis for assuming that the nonrespondents are made up of people

with either strong positive attitudes or strong negative attitudes toward direct uninvited solicitation.

Considering the fact that no follow-ups were made to nonrespondents, the response rate was an excellent 27.7 percent; 698 usable questionnaires were returned.

The responses indicate that about two-thirds of the AICPA membership have negative attitudes toward direct uninvited solicitation. Partners in CPA firms and older CPAs hold stronger negative attitudes toward direct uninvited solicitation than dc staff members in CPA firms and younger CPAs. In fact, there is a direct relationship between age, or years in practice, and the intensity of negative attitudes toward direct uninvited solicitation.

A small segment--about 10 percent--of the membership holds extremely positive views toward direct uninvited solicitation.

Those who hold negative attitudes toward direct uninvited solicitation perceive greater differences between direct uninvited solicitation and other forms of promotion. Those who hold more positive attitudes toward direct uninvited solicitation see fewer differences between various types of promotion.

Based on current trends, and if no countervailing action is brought to bear on the situation, it appears likely that in the future, members' attitudes will become more positive toward direct uninvited solicitation and that the practice of direct uninvited solicitation will become more widespread.

What Is Direct Uninvited Solicitation?

In order to determine how members define direct uninvited solicitation, the questionnaire presented ten case-type

situations and asked respondents to indicate the extent to which each case was an example of direct uninvited solicitation.

The members believe that the act of handing a potential client a business card does not constitute direct uninvited solicitation. At the other extreme, they believe that writing letters or placing telephone calls to potential clients definitely constitutes direct uninvited solicitation.

There are, however, some ambiguities in member thinking about what constitutes direct uninvited solicitation. Suppose a CPA invites a potential client to lunch and to a tour of his firm's office. The membership is unsure whether this is or is not direct uninvited solicitation. Uncertainty is expressed, likewise, in a case where a CPA volunteers accounting information to a potential client and indicates his interest in being engaged to handle the problem at hand.

The membership believes that newspaper and trade journal advertising, while still part of that "gray area," tend to be definable as direct uninvited solicitation.

Thus, it appears that two factors are determining member thinking on this question. First, the more impersonal is the contact (for example, advertising, mass mailings, telephone campaigns), the more likely are members to categorize the act as an example of direct uninvited solicitation. Second, the farther removed is an act from a potential client's direct inquiry about an accounting question, the more likely will members view the act as an example of direct uninvited solicitation. Both factors must be considered. This would imply, for instance, that mass mailings to people who never requested information or to people whom

a CPA never met, would be an example of direct uninvited solicitation. Personal visits to people whom a CPA has met or who ask for information would not be considered direct uninvited solicitation. Areas of ambiguity are personal visits to people whom a CPA never met or who did not request information.

Effects of Solicitation on the Public and the Profession

The membership expresses slight disagreement with the notions that solicitation makes the public more aware of the profession's capabilities and that solicitation causes unsophisticated people to make decisions about CPA services that are not based on their own objective choice.

A greater amount of disagreement is expressed with the following statements: Solicitation helps the public make more informed decisions about selecting a CPA; solicitation lowers the quality of services CPAs render; and solicitation impairs the independence of CPAs.

The membership strongly disagrees with claims that a ban against direct uninvited solicitation violates the free speech of CPAs or denies the public opportunity to select CPAs on the basis of either cost or scope of services.

Respondents agree with the notions that direct uninvited solicitation adversely affects the public image of CPAs and that such solicitation would occur whether or not a ban exists.

The bulk of the membership believes that direct uninvited solicitation is not in the public interest, will tend to lower CPA fees, reduce the public's expectation of the quality of CPA services, and increase both litigation against CPAs and government regulation of the profession.

The membership is uncertain about the financial effect of direct uninvited solicitation on their careers.

Is Solicitation "Unprofessional"?

A large majority of the membership believes that direct uninvited solicitation is not professional. This belief is stronger among CPAs in public practice than among CPAs in industry. Of the CPAs in public practice, partners express stronger agreement with the statement that solicitation is unprofessional than do staff members. Also, older CPAs express stronger agreement with the statement than do younger CPAs.

Most members agree that direct uninvited solicitation by CPAs is comparable to "ambulance chasing" by lawyers. The only group of CPAs to disagree with this statement are the youngest AICPA members (less than five years in the accounting profession). On the other hand, all other age groups agree with the statement, and the extent of agreement varies directly with the years of experience in accounting.

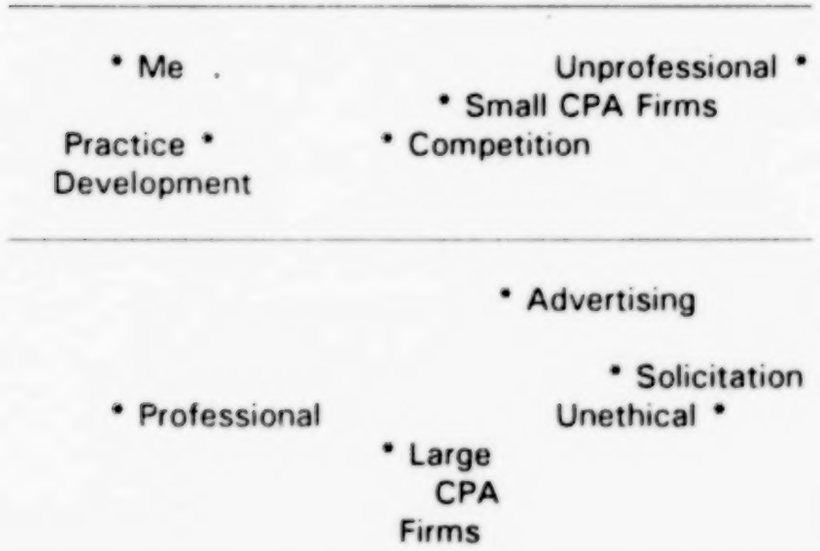
Solicitation and Other Forms of Promotion

The following statement was posited to AICPA members: "Direct uninvited solicitation is difficult to distinguish from other forms of promotion." The average respondent slightly disagrees with this statement. The membership appears to believe that, while it is possible to distinguish between direct uninvited solicitation and other forms of promotion, the apparent differences are sometimes indistinct.

In another part of the questionnaire, the membership was asked to respond to several paired comparison questions designed to determine how members perceive the relationships between various concepts. Using a statistical technique known as multidimensional scaling, it is possible to create a "map" of these perceived relationships. Figure 1 displays such a map for the entire sample.

Figure 1

Perceptual Map: Solicitation and Related Concepts



The location of the concepts in figure 1 is analogous to the location of cities on a physical map. Concepts close to each other are perceived to be more similar than are concepts farther from each other.

The concept "me" represents the average respondent. Respondents perceive concepts close to the "me" as psychologically near and identify with them. Concepts

farther from the "me" are psychologically distant and do not elicit identification.

In figure 1 "me" is close to "professional," and far from "unprofessional," thus, AICPA members do not consider themselves to be unprofessional. Also, the "me" is relatively close to "practice development" and "competition," which indicates that these concepts are acceptable to professional accountants.

The concepts "advertising" and "solicitation" are farther removed from "me" and are closer to the negative concepts "unprofessional" and "unethical." Thus, while practice development is considered to be "Professional," advertising and solicitation, on the other hand, are seen to be "unprofessional." Solicitation is closer to "unprofessional" and "unethical" than is advertising.

Comparative maps showing how members holding opposing views on solicitation perceive these relationships yield interesting results. Those who hold more positive attitudes toward solicitation show the concepts "advertising" and "solicitation" moving closer together and moving nearer to "competition," a concept with more positive connotations. At the same time "unprofessional" and "unethical" move farther away from the "me." Thus, for this group, the concepts "unprofessional" and "unethical" are much less relevant to the solicitation issue. These people see little difference between solicitation and advertising, and they consider both of these to be acceptable methods of competition or practice development.

For those who hold negative attitudes toward solicitation, the opposite occurs. The concepts "solicitation," "un-

ethical," and "unprofessional" converge. A greater distinction is seen between advertising and solicitation, and solicitation is seen as a less acceptable method of promotion.

Thus, if actions are based on the way people perceive a situation, it is likely that those who hold positive attitudes toward solicitation will engage in the practice of solicitation with greater frequency.

Member Opinion About Direct Uninvited Solicitation

The questionnaire asked members to assume that no legal or ethical ban exists against direct uninvited solicitation. Given this restraint, about 37 percent of the membership disagrees, with varying degrees of intensity, that direct uninvited solicitation should be banned by the AICPA Code of Ethics. About 11 percent are unsure, and 52 percent agree that it should be banned.

When the question was positively phrased, without assumptions about legal or ethical prohibitions, similar results were recorded. About 30 percent of the membership agrees, with varying degrees of intensity, that direct uninvited solicitation should be allowed by the AICPA. Ten percent are neutral, and 60 percent disagree that direct uninvited solicitation should be allowed.

APPENDIX B

Attitudinal Survey of AICPA Members Selected on Statistical Sampling Basis February 1981

Questionnaire

American Institute of Certified Public Accountants
Special Committee on Solicitation

Attitudinal Survey of AICPA Members
— Selected on Statistical Basis

1. To what extent are each of the following cases examples of solicitation? (Please respond to each of the following cases on a 0-100 scale.)

0		100
No Solicitation	Indirect Uninvited Solicitation	Direct Uninvited Solicitation

Your Rating

a. A CPA was seated next to the president of a corporation on a flight. During their conversation, the CPA explained the nature of his work and his ability to service such organizations. He gave the president his business card. ____

b. A CPA met the owner of a business at a benefit for a local arts organization. A week later the CPA invited the owner to lunch and to a tour of his firm's offices. ____

c. At a cocktail party, a CPA was asked for his views on an accounting question. The CPA, without getting into details, gave an overview of the issues involved. The next day, the CPA phoned the man who asked for his advice. The CPA volunteered more information and indicated his interest in being engaged to handle the problem. ____

d. In an effort to obtain more financial institutions as clients, a CPA mailed a letter to the top officer in **all** the banks and S&Ls in his area. The letter was addressed to the officer by **name and title** and requested the opportunity to meet with him. ____

e. In an effort to obtain more financial institutions as clients, a CPA mailed a letter to the top officer in **all** the banks and S&Ls in his area. The letter was addressed to the officer by **title only** and requested the opportunity to meet with him. ____

f. In an effort to obtain a financial institution as a client, a CPA mailed a letter to the top officer in a **particular** bank in his town. The letter was addressed to the officer by **name and title** and requested the opportunity to meet with him. ____

g. In an effort to obtain a financial institution as a client, a CPA mailed a letter to the top officer in a **particular** bank in his town. The letter was addressed to the officer by **title only** and requested the opportunity to meet with him. ____

h. A CPA firm had its partners telephone all retail furniture stores in its area to inform them about the firm's services. ____

i. A CPA firm placed an ad in a construction industry trade journal. The ad stressed the firm's high professional standards and urged contractors to call for a fee estimate. ____

j. A CPA firm placed an ad in a local newspaper. The ad stressed the firm's high professional standards and urged the readers to call for a fee estimate for tax return preparation. ____

2. For the questions in this section, **assume that there is no legal or ethical ban on direct uninvited solicitation**. (Using your own definition of direct uninvited solicitation, please respond to each item on a 0-100 scale, where zero indicates total disagreement and 100 indicates total agreement with the statement.)

0	100
Total Disagreement	Total Agreement

Your Rating

DIRECT UNINVITED SOLICITATION:

a. is not "professional" . . . . . ___
b. is difficult to distinguish from other forms of promotion . . . . . ___
c. should be banned by the AICPA Code of Professional Ethics . . . . . ___
d. is comparable to ambulance chasing by lawyers . . . . . ___
e. makes the public more aware of the CPA profession's capabilities . . . . . ___
f. helps the public make more informed decisions about selecting a CPA . . . . . ___
g. lowers the quality of services that CPAs render . . . . . ___
h. adversely affects the public image of CPAs . . . . . ___
i. impairs the independence of CPAs who acquire clients by this method . . . . . ___
j. would occur whether or not a ban exists . . . . . ___

99

k. causes unsophisticated individuals to make decisions about CPA services which are not based on their own free and objective choice . . . . . ___

3. People see things in terms of similarities and differences. For example, planes and trains, apples and oranges, and Republicans and Democrats are seen as similar in some respects and different in other respects.

(Please respond to each of the following on an open-ended scale where zero indicates no difference at all (i.e. complete similarity), and positive numbers express greater degrees of difference.)

For example, the difference between the concepts "lawyer" and "attorney" might be expressed as zero. The difference between the concepts "rugby" and "football" might be expressed as 50. The difference between the concepts "McGovern" and "Reagan" might be expressed as 70, 350, or 1000 or more, depending on your perceptions.

0	50	100	200	1000	>
No Difference	More Difference		More Difference		More Difference

97

IF THE DIFFERENCE BETWEEN DIRECT MAIL AND ADVERTISING IS 50, THEN HOW DIFFERENT ARE THE FOLLOWING CONCEPTS?

advertising and competition . . . . . ___
advertising and unethical . . . . . ___
advertising and professional . . . . . ___
advertising and me . . . . . ___
advertising and solicitation . . . . . ___
advertising and practice development . . . . ___

competition and unethical . . . . . ____
competition and professional . . . . . ____
competition and me . . . . . ____
competition and solicitation . . . . . ____
competition and practice development . . . ____
unethical and large CPA firms . . . . . ____
unethical and unprofessional . . . . . ____
unethical and small CPA firms . . . . . ____
me and large CPA firms . . . . . ____
me and unprofessional . . . . . ____
me and small CPA firms . . . . . ____
advertising and large CPA firms . . . . . ____
advertising and unprofessional . . . . . ____
advertising and small CPA firms . . . . . ____
competition and large CPA firms . . . . . ____
competition and unprofessional . . . . . ____
competition and small CPA firms . . . . . ____
solicitation and practice development . . . . ____
solicitation and large CPA firms . . . . . ____
solicitation and unprofessional . . . . . ____
solicitation and small CPA firms . . . . . ____
professional and me . . . . . ____
professional and solicitation . . . . . ____
professional and practice development . . . ____
professional and large CPA firms . . . . . ____
professional and unprofessional . . . . . ____
professional and small CPA firms . . . . . ____
me and solicitation . . . . . ____
me and practice development . . . . . ____
practice development and large CPA firms . ____
practice development and unprofessional . . . ____
practice development and small CPA firms . ____
unethical and professional . . . . . ____
unethical and me . . . . . ____
unethical and solicitation . . . . . ____
unethical and practice development . . . . . ____
large CPA firms and unprofessional . . . . . ____
large CPA firms and small CPA firms . . . . . ____
unprofessional and small CPA firms . . . . . ____

THE FOLLOWING PROMOTIONAL PRACTICES SHOULD BE ALLOWED BY THE AICPA CODE OF PROFESSIONAL ETHICS:

0	100
Total Disagreement	Total Agreement

a. Direct uninvited solicitation of potential clients . . . . . ____
b. Solicitation letters to the office of a potential client which are not address to a particular individual . . . . . ____
c. Solicitation letters addressed to a particular person in the potential client's firm . . . . . ____
d. Phone calls to solicit potential clients . . . . . ____
e. Any practice to solicit potential clients that is not false, misleading or deceptive . . . . . ____

5. Listed below are opposing effects of direct uninvited solicitation. The statement on the left has a rating of zero, and the statement on the right has a score of 100. (For each pair, enter a number from 0-100 indicating where on the scale you think the true effect of direct uninvited solicitation lies.)

			Your Rating
	DIRECT UNINVITED SOLICITATION:		
	0	100	
a.	is not in the public interest	is in the public interest	____
	0	100	
b.	lowers CPAs' fees	raises CPAs' fees	____
	0	100	
c.	adversely affects me financially	benefits me financially	____
	0	100	

d. lowers public expectations of the quality of CPA Services ____ raises public expectations of the quality of CPA services

0 ——— 100

e. will decrease litigation against CPAs ____ will increase litigation against CPAs

0 ——— 100

f. will decrease government regulation of CPAs ____ will increase government regulation of CPAs

6. For this set of questions, assume that direct uninvited solicitation is **prohibited** by the AICPA Code of Professional Ethics. Assume no conflict with state or federal laws. (Please respond to each item on a 1-100 scale, where zero indicates total disagreement and 100 indicates total agreement with the state.)

0 ——— 100

Total Disagreement — Total Agreement

Your Rating

A PROHIBITION IN THE AICPA CODE OF PROFESSIONAL ETHICS AGAINST DIRECT UNINVITED SOLICITATION:

a. is a violation of CPAs' freedom of speech ____
b. lessens competition among CPAs ____
c. denies potential clients the opportunity to choose a CPA on the basis of cost ____
d. denies potential clients the opportunity to choose a CPA on basis of scope of service ____
e. helps protect the public against deceptive and unscrupulous practices ____
f. prevents CPAs from encroaching on each others' practice ____
g. protects CPAs' clients from receiving information that plays on their fears ____

You and Your Environment

1. Where do you work?(circle one)
   Public Accounting:

Over 201 professional staff	1	Industry	5
51-200 professional staff	2	Government	6
50 or less professional staff	3	Education	7
Sole practitioner	4	Other	8

2. If you work in public accounting, what is your position in your firm?(circle one)
   Partner or owner 1
   Staff 2

3. How many years have you been working in accounting (public and/or private)?
   (enter number) ____ years

APPENDIX C

Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, N.Y. 10022

June 9, 1981

Special Committee on Solicitation
American Institute of Certified
Public Accountants
1211 Avenue of the Americas
New York, New York 10036

Gentlemen:

As counsel to the Special Committee on Solicitation, we are furnishing today to each Committee member a 121-page opinion letter setting forth our conclusions and underlying legal analysis with respect to the antitrust risks involved in various suggested courses of action which the American Institute of Certified Public Accountants ("AICPA") might take to cope with the problem of direct uninvited solicitation. At the Committee's request, we summarize below our conclusions for the benefit of the entire AICPA membership; we understand that the full text of our opinion letter will be on file with the Institute's General Counsel and will be available to any AICPA member who wishes to consult it.

1. *The AICPA could not unqualifiedly reimpose its prior ban on direct uninvited solicitation (both written and oral) without running a substantial antitrust risk.* The validity of such a ban would probably be governed by the rule of reason rather than condemned as illegal per se under the Sherman Act. However, given the present trend

of the case law, we believe it unlikely that the legality of the ban would be upheld in a rule-of-reason inquiry. That direct uninvited solicitation may be viewed as inconsistent with an accountant's professional image is not a permissible antitrust justification. Nor could such a sweeping prohibition--covering both written as well as oral solicitation--be successfully defended as a prophylactic measure to prevent otherwise undetectable instances of false, misleading or oppressive solicitation, since a less restrictive alternative exists for dealing with these problems, at least insofar as solicitation in written form is concerned. In that connection, the AICPA could, without incurring antitrust liability, require its members to file copies of all direct uninvited promotional literature simultaneously with, or within a reasonable time after, its dissemination to potential clients. By so doing, the AICPA could police written solicitation for instances of deception under the present version of Rule 502 of the Code of Professional Ethics, as well as for instances of overreaching or similar untoward conduct if the current ban were expanded along the lines suggested in Conclusion 4 below.*

2. *Given our present state of knowledge, the AICPA could not impose a ban on direct uninvited oral solicitation without running a substantial antitrust risk.* Even this more limited ban would probably be deemed an unreasonable restraint of trade, despite the fact that a better argument can be made for the need for a prophylactic prohibition to prevent instances of false, misleading and oppressive oral

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*Obviously, the cost and burden of administering such a filing requirement would be significant.

solicitation which are extremely difficult to detect and prove absent a written record. The difficulty with the argument is that the AICPA would be obligated in an antitrust action to demonstrate factually that direct uninvited oral solicitation is likely to lead to false, misleading or deceptive claims or oppressive conduct, thus justifying the need for prophylaxis and offsetting the presumed anti-competitive consequences of the prohibition. Based on the record thus far available to us--including the State Board and State CPA Society responses to the Special Committee's questionnaire--we are unaware of any body of empirical data which would satisfy this burden. This is not to suggest that such data is non-existent; it simply has not been brought to our attention. Moreover, even if such a factual showing could be made, it would not necessarily assure that the ban would be sustained; it would still be left to the trier of facts to determine whether the evidence was sufficiently compelling to justify the ban.

3. *Absent a factual showing that direct uninvited solicitation is likely to impair auditors' independence in fact or is likely to be perceived as so doing by users of financial statements, the AICPA could not impose a ban on direct uninvited solicitation of audit and review engagements without running a substantial antitrust risk.* We believe that the preservation of an auditor's independence in fact or appearance would constitute a permissible rule-of-reason justification, since the SEC has repeatedly recognized that independence is essential to protect the public's reliance on audited financial statements. However, to support a ban on direct uninvited solicitation of audit and review engagements, the AICPA would have to prove that such conduct is likely to impair the independence of accountants in fact or is likely to be perceived as so doing by users of financial statements; and we are presently unaware of any empirical data which would sustain this burden. On the contrary, according to the results of the Special Committee's attitudinal survey, the AICPA membership itself does not feel strongly that direct uninvited solicitation poses a serious threat to independence. Moreover, the SEC has given no indication since the AICPA eliminated its prior ban on direct uninvited solicitation that it is concerned that this practice will unduly compromise independence in fact or in appearance.

4. *Without running a substantial antitrust risk, the AICPA could enlarge its existing ban on false, misleading and deceptive solicitation to also proscribe solicitation involving coercion, duress, compulsion, intimidation, threats, overreaching or vexatious or harassing conduct.* The elimination of deception is a permissible antitrust justification under the rule of reason, and we believe that preventing overreaching and other types of untoward conduct should stand on an equal footing. Indeed, a Justice Department spokesman has indicated that a ban on solicitation by accountants involving coercion, duress, compulsion, intimidation, threats, overreaching or vexatious or harassing conduct would pass antitrust muster.

5. *Without running a substantial antitrust risk, the AICPA Board of Directors could issue a non-enforceable policy statement underscoring the potential dangers to the public and the profession created by direct uninvited solici-*

tation. So long as the Board makes it clear that no AICPA member will be disciplined for engaging in any form of solicitation not expressly proscribed by Rule 502--thus eliminating the threat of professional sanction in those instances--the Board's issuance of such a policy statement would not in our opinion be vulnerable to antitrust attack.

6. *Without running a substantial antitrust risk, the AICPA could engage in a concerted lobbying campaign to secure state legislative bans on direct uninvited solicitation which the antitrust laws would preclude the AICPA itself from adopting; moreover, such legislative bans, if enacted and enforced, would likely be immune from antitrust attack. However, such state-imposed bans would probably be held unconstitutional by the United States Supreme Court as violative of the First Amendment.* Concerted lobbying efforts aimed at securing such state legislative bans would be immune from antitrust liability under the so-called *Noerr-Pennington* doctrine. Moreover, the enactment of such legislative bans and their enforcement by appropriate state agencies would be protected from antitrust attack by the so-called state action doctrine. On the other hand, it would be more risky for the AICPA to lobby state accountancy boards to promulgate such bans because of the substantial overlap in identity between AICPA and State Board members; and it is far from clear that such promulgation would be exempt from antitrust challenge under the state action doctrine. In any event, it is our opinion that any state ban on non-deceptive written solicitation by accountants would be struck down as unconstitutional by the United States Supreme Court. Moreover, although we are less certain, a

careful reading of the United States Supreme Court's opinion in the *Ohralik* case, involving the application of a state no-solicitation rule to ambulance chasing by attorneys, leads us to conclude that that Court probably would hold unconstitutional a state ban on direct uninvited oral solicitation by accountants if applied to non-deceptive communications in non-coercive circumstances. Finally, in our judgment, a state ban on direct uninvited solicitation of audit and review engagements would probably not survive constitutional challenge absent a showing that such conduct is likely to impair auditors' independence in fact or be perceived as so doing by users of financial statements.

Very truly yours,
Kaye, Scholer, Fierman,
Hays & Handler

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,
Plaintiff,

vs. Civil Case No. TCA 88-40264-MMP

FRED H. EDENFIELD, JR.,
et al.,
Defendants.

ORDER

This case comes before the court on plaintiff's motion for summary judgement (Doc. 13). The court heard oral argument and has reviewed all affidavits, exhibits, and memoranda submitted by the parties in making its decision. The plaintiff is entitled to summary judgement as a matter of law, and his motion is GRANTED to the extent discussed below. See Fed. R. Civ. P. 56; Rollings v. TechSouth, Inc., 833 F.2d 1525 (11th Cir. 1987).

I. STATEMENT OF THE CASE

The plaintiff, Scott Fane, is a certified public accountant licensed to practice in Florida. Mr. Fane moved from New Jersey to Florida in 1985 and seeks to establish an accountancy practice. In order to build his clientele, he wants to engage in direct, in-person, uninvited[1] solicitation of poten-

[1]Defendants concede that Florida's regulations do not prohibit direct, in-person, invited solicitation. The state's definition of "invited" is rather broad. For example, a general business discussion during a social gathering invites solicitation. See Defendants' Response to Motion for Summary Judgement (Doc. 23, pp.315-16).

tial clients. He is precluded from doing so by Rule 21A-24.002 of the Florida Administrative Code[2] which specifically prohibits this type of commercial speech. The defendant does not dispute that the rules restrict truthful commercial speech about lawful activities, and thereby raise first and fourteenth amendment issues. The present debate centers on whether the restrictions pass constitutional muster in light of recent Supreme Court decisions upholding similar restrictions on attorney solicitation.

The defendant asserts that the primary objective of the rule is to protect the CPA's integrity, independence, and objectivity while performing the "attest function." The "attest function" is the issuance of an independent opinion regarding a client's financial soundness based on an audit or review of a client's financial statements.[3]

In addition to protecting CPA's and the attest function, the restriction seeks to prevent solicited clients from luring the CPA into a collusive relationship whereby a fraudulent

[2]Section 21A-24.002(2) provides "[a] licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . [c] where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication. Section 21A-24.002(3) makes unlawful "any communication which directly or indirectly requests an immediate oral response from the recipient."

[3]Only CPA's perform the attest function, therefore the prohibition does not restrict other providers of related financial services. Although that point seems to dispose of the plaintiff's equal protection argument, this court concludes that the regulation is unconstitutional on other grounds, and never reaches the merits of that claim.

attestation is issued. Such attestations may be used to deceive third parties. Those third parties may be the client's business associates or members of the general public who rely on the CPA's attestation. Additionally, the defendant seeks to preserve the restriction as a way to avoid the difficulties of proving and punishing CPA misconduct.

The defendant claims that the validity of these interests and the means used to serve them are supported by analogy to the Supreme Court's analysis in its series of attorney solicitation cases. (See Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S.Ct. 1916 (1988) (personalized mailings to potential clients with foreclosure problems); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (printed advertisements directed to drunk drivers and Dalkon shield users); Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) (direct, in-person, uninvited solicitation of accident victims). However, a careful analysis of that series of cases compels the opposite conclusion.

II. INTRODUCTION

Government suppression of the free flow of truthful commercial speech regarding lawful activities should be tolerated only when a substantial government interest is being served by regulations which directly advance that interest. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638 (1985) (citing Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980)). Furthermore, those regulations must be narrowly tailored to achieve the desired objective. Board of Trustees of State

University of New York v. Fox, 109 S.Ct. 3028, 3035 (1989) (least restrictive means test explicitly rejected).

The defendant asserts that the justifications for banning direct, in-person, uninvited solicitation by attorneys supports a similar ban on like solicitation by CPA's. The Supreme Court's rationale for upholding the ban on attorney solicitation focuses on two general concerns or factors uniquely associated with attorneys: the possibility of undue influence and overreaching, and the absence of regulatory control. Shapero v. Kentucky Bar Association, 486 U.S. 466, 475, 108 S.Ct. 1916, 1922 (1988). When applied to the present case, this analysis reveals that those concerns are not present in the context of direct, in-person, uninvited solicitation by CPA's. Even if such concerns were found to be present, a logical distinction between the different types of CPA solicitation could not be made to justify their different treatments.

III. THF FIRST FACTOR

The Supreme Court emphasized in its most recent attorney solicitation decision that "[i]n assessing the potential for over-reaching and undue influence, the mode of communication makes all the difference." Shapero v. Kentucky Bar Association, 486 U.S. 466, 475, 108 S.Ct. 1916, 1922 (1988). In Shapero, the Court struck down a ban on attorneys' direct mailings to potential clients with known particular problems. Id. In Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985), the Court used similar reasoning in striking down a rule which prohibited newspaper advertising by attorneys. In contrast, the Court in Ohralik v. Ohio State

Bar Association, 436 U.S. 447 (1978), upheld an unqualified ban on direct, in-person, uninvited solicitation of potential clients by attorneys.

In the above cases, the Court recognized that the dangers associated with in-person attorney solicitation which justify its absolute prohibition are not sufficiently strong with respect to other forms of solicitation to warrant similarly harsh treatment. Shapero, 486 U.S. at 472, 108 S.Ct. at 1921; Zauderer, 471 U.S. at 641; Ohralik, 436 U.S. at 465. The dangers associated with direct, in-person, uninvited solicitation by attorneys stem from the profession's training: this background increases the client's susceptibility to exploitation. Shapero, 486 U.S. at 475, 108 S.Ct. at 1922; Zauderer, 471 U.S. at 642; Ohralik, 436 U.S. at 465-66. The relevant focus must be on the solicitor's training and opportunity to use this training when engaged in a particular mode of communication. Comparing the dangers threatened by CPA solicitation to the dangers associated with similar solicitation by attorneys reveals the weaknesses in defendants' argument.

First, the professional training of attorneys and CPA's is different. An attorney is "a professional trained in the art of persuasion." Ohralik, 436 U.S. at 465. Unlike other forms of attorney solicitation, face-to-face solicitation allows the attorney a chance to practice this art. Zauderer, 471 U.S. at 641 (direct solicitation involves "the coercive force of the personal presence of a trained advocate"). Furthermore, the unique behaviors associated with attorneys warrant more restrictive regulations involving in-person solicitation. Shapero, 486 U.S. at 472, 108 S.Ct. at 1921. The Supreme Court has expressed concern about the potential client's inability to avoid "a badgering advocate breathing down his neck." Shapero, 486 U.S. at 475, 108 S.Ct. at 1922. Consequently, when lawyers are engaged in direct, in-person, uninvited solicitation as compared to other sellers of goods or services, "it hardly need be said that the potential for over-reaching is significantly greater." Id.

The Fourth Circuit extended this reasoning in upholding a ban on certain types of solicitation (including in-person) by people selling preneed funeral contracts. National Funeral Services, Inc. v. Rockefeller, 870 F.2d 136 (4th Cir. 1989), cert denied, 110 S.Ct. 409. The court noted the peculiarity of upholding a ban outside of the attorney context, noting the very "unique nature" of preneed funeral contract solicitation. Id. at 143 n.11. Judge Hall noted the uncommon similarities which warranted the analogy between preneed funeral contract and attorney solicitation as follows: "In both, an advocate trained in the art of persuasion is trying to convince an emotionally vulnerable layperson that he needs professional services." Id.

In contrast, CPA's are not trained to be coercive, persuasive, or to take particular advantage of a face-to-face situation: their training emphasizes independence and objectivity. In light of the distinctive training given attorneys, the defendant cannot analogize to those Supreme Court decisions which deal with attorney solicitation to justify its ban on direct, in-person, uninvited solicitation by CPA's. The dangers associated with in-person solicitation by uniquely trained attorneys simply are not present in the CPA context.

Second, the effect on the potential client from an attorney's direct, in-person, uninvited solicitation is substantially different from the effect when the same solicitation comes from a CPA. The two groups of potential clients that are targeted for solicitation are in significantly different positions. An attorney identifies a potential client by his "adverse conditions." Ohralik v. Ohio State Bar Association, 436 U.S. 447, 465 (1978). Usually, the attorney solicits "victims of misfortune."[4] The ban on attorney solicitation guards against invasions of privacy and additional distress. Id. Such dangers are present regardless of the attorney's style of approach or intentions. Id. at 465 n.25.

Another factor which enhances the likelihood of exploitation is the client's lack of sophistication about legal matters and services. Id. at 465 n.24. Thus, it is very likely that an attorney will be able to pressure the potential client into immediately accepting services that she may not need or want. The client may be left without the benefit of reflection, others' advice, or exploration of the available alternatives. Id. at 457.

Whereas attorneys may zero in on an "unsophisticated, injured or distressed lay person," Id. at 465, certified public accountants prefer to solicit prosperous business people as potential clients. These people tend to be knowledgeable

[4]This court recognizes that some potential clients of attorneys will be in the same position as potential clients of accountants. Though these persons are objectively in the same position, the attorney's potential client is quite likely to be in adverse conditions, and will be confronted by a uniquely trained individual. These differences serve to distinguish objectively similar situations.

about financial matters and successful enough to require specialized accounting services: they know what they need and whether the accountant can fulfill this need. Furthermore, the solicitation usually takes place in a business setting, a place where the potential client will not feel intimidated. Thus, the defendant cannot argue that the CPA solicitation regulation protects the potential client from harms which are likely to accompany the prohibited type of attorney solicitation.

Additionally, the defendant suggests that the disputed regulation prevents fraudulent attestations, thereby insuring that third parties will not rely on such to their detriment. Given the direct advancement requirement of Central Hudson,[5] the defendant's efforts to protect parties outside the professional relationship from indirect harm, though understandable, is inappropriate.

Even assuming that protection of third parties is appropriate, several significant problems remain with the defendant's argument. First, there is a causation problem when we try to link the alleged misconduct of the CPA with the harm incurred by the third party. Apparently, the defendant is concerned that the client will exert undue influence on the CPA and exploit a face-to-face confrontation to persuade the CPA to commit a fraud. Ultimately, this assertion posits that the client is using the CPA to deceive that client's business associates or members of the general public about her financial soundness. The defendant seems to encourage regulating the innocent and valuable activities of one group

[6]See discussion above, at p.1.

to forestall the criminal activities of another. The link between regulation and forbidden activities seems quite tenuous, if at all existent.

Second, there are problems with the defendant's suggestion that a CPA who uses direct, in-person, uninvited solicitation is more likely to commit fraud than a CPA who uses other forms of solicitation. The differences between the prohibited solicitation and direct mailings, for example, seem far too superficial: in both cases, the eventual face-to-face will give rise to possibilities for collusive and improper behavior. Thus, even if we assume that there exists a causal link between solicitation and misconduct, the defendant's varying treatment of different modes of solicitation is not justified.

Third, the defendant's implicit assumption that a client is more likely to approach an unknown CPA about illegal activities is unfounded. The more logical assumption is that such a client would more likely approach a known CPA with whom she has a long-standing and mutually profitable relationship: the client is more likely to trust such a person and the CPA has more to lose (i.e. an established client) by refusing to cooperate.

As the preceding clearly demonstrates, the defendant has failed to demonstrate a causal relationship between in-person, direct, uninvited solicitation, and accountant misconduct. Similarly, the defendant has failed to prove any harm to third parties as a result of the alleged misconduct. Assuming that defendant had proven some link between this type of solicitation and accountant misconduct, the defendant has not shown how the prohibited form of solicitation

is more likely to result in misconduct compared to other permissible forms of solicitations. Therefore, Florida Administrative Code, §§ 21A-24.002(2) and (3), fail to satisfy Central Hudson's requirement that the regulation directly advance a substantial government interest. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). Thus, the defendant cannot prove that there is a "reasonable fit" between the objective of preventing fraud and the harsh restriction on speech chosen to accomplish it. Board of Trustees of the State University of New York v. Fox, 109 S.Ct. 3028, 3035 (1989).

Further, even if this solicitation does directly result in the alleged misconduct, the present regulation does not reflect the only effective approach. Fox, 109 S.Ct. at 3034 (citations omitted). Under Florida Statutes, §§ 473.323(b) and (c), a CPA who engages in fraud is subject to fines, loss of license, and other penalties. As this statute directly addresses the alleged problem and provides adequate remedies, the blanket prohibition on in-person, direct, uninvited solicitation can be viewed only as an unnecessary restriction on speech. See Shapero v. Kentucky Bar Association, 486 U.S. 466, 476, 108 S.Ct. 1916, 1923 (1988); Fox, 109 S.Ct. at 3035 (regulations unconstitutional if "more extensive than their object requires").

IV. THE SECOND FACTOR

The defendant's argument that a blanket prohibition of in-person, direct, and uninvited solicitation by CPA's is necessary because of the difficulties in proving the occur-

rence of misconduct is also unpersuasive. In forwarding this argument, the defendant once again enlists the attorney solicitation cases for help. Once again, this reliance is misplaced. In the attorney context, the alleged misconduct in solicitation is "not visible or otherwise open to public scrutiny and for which it is 'difficult or impossible to obtain reliable proof of what actually took place.'" Shapero v. Kentucky Bar Association, 486 U.S. 466, 476 , 108 S.Ct. 1916, 1923 (1988) (quoting Ohralik v. Ohio State Bar Association, 436 U.S. 447, 466 (1978)).

In the CPA context, however, proof regarding alleged misconduct is readily available. The relevant financial data could be obtained via discovery from the client, and then used by an independent accountant to check the questioned financial statements. Irregularities could be uncovered through this relatively simply process, and the accountant who used improper methods and principles in violation of Florida Administrative Code, Rules 21A-22.001-008, could be appropriately disciplined. These facts are objectively verifiable. Cf. Zauderer, 471 U.S. 644 ("the indeterminacy of statements about law makes it improbable if not impossible to verify its accuracy or truthfulness").

V. CONCLUSION

Florida Administrative Code, §§ 21A-24.002(2) and (3), places an unconstitutional ban on protected commercial speech in violation of the first and fourteenth amendments. The Board of Accountancy and State are hereby enjoined from enforcing that regulation as it is applied to CPAs who seek clients through in-person, direct, uninvited solicitation in the business context.

DONE AND ORDERED this 13th day of September, 1990.

Maurice M. Paul
United States District Judge

FANE v. EDENFIELD

Scott FANE, Plaintiff-Appellee,

v.

Fred H. EDENFIELD, Jr., Richard J. Aboud, Whipple Van Ness Jones, Jr., Margaret F. Stroupe, Dean F. Denison, William R. Martin, Joseph R. Millsaps, Antonio L. Argis, Jerome A. Schine, in their official capacities as members, Board of Accountancy, Defendants-Appellants.

No. 90-3943.

United States Court of Appeals, Eleventh Circuit.

Oct. 30, 1991.

Appeal from the United States District Court for the Northern District of Florida.

Before EDMONDSON and DUBINA, Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

DUBINA, Circuit Judge:

The appellants, all of whom are members of the Florida Board of Accountancy ("the Board"), appeal the district court's grant of summary judgment in favor of the appellee, Scott Fane ("Fane"). For the reasons which follow, we affirm the district court's grant of summary judgment.

I. FACTUAL BACKGROUND

Fane is a certified public accountant ("CPA") who is certified in New Jersey and Florida. In the mid-1980's, he

*Honorable Jesse E. Eschbach. Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

moved to Florida to set up an accounting practice, and sought to solicit business via in-person contacts with businesses he felt would be interested in his services. Fane was not able to implement his planned solicitation, however, because in-person solicitation by CPAs is forbidden in Florida.[1] The ban only applies to CPAs. Other financial professionals, such as non-certified accountants, bookkeepers, and tax preparers, are not prohibited from utilizing personal contacts to solicit new clients.

Only three other states, i.e., Georgia,[2] Texas,[3] and Louisiana,[4] prohibit in-person solicitation by CPAs. In addition, the accounting boards of twelve other states prohibit in-person solicitation, although the validity of such a prohibition by competing accountants without legislative authorization has been questioned under the antitrust laws. R1-18-1, Exh. D (letter from Anthony Low Joseph, Bureau of Competition, Federal Trade Commission, to Eleanor

[1]Pursuant to Fla.Stat.Ann. § 473.323(1)(1) (West 1991). A CPA engaging in "direct, in person, uninvited solicitation of a specific potential client" constitutes grounds for disciplinary action. Fla.Admin.Code Ann. R. 21A-24.002(3) (1991) defines a prohibited solicitation as "any communication which directly or implicitly requests an immediate oral response from the recipient." The regulation specifically states that "[u]ninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited."

[2]O.C.G.A. § 43-3-35(i) (1988).

[3]Tex.Rev.Civ.Stat.Ann. art. 41a-1. § 6(a)(2) (West 1991).

[4]See United States v. State Board of Certified Public Accountants of Louisiana, Civ. No. 83-1947, 1987 WL 7905 (E.D.La. Mar. 11, 1987) (complaint alleging that restraints on advertising and solicitation violated antitrust laws dismissed on ground that legislature had authorized restraints).

Weinstock, Florida State Senator (Apr. 28, 1987), comparing Florida's statutory regulation of CPAs' solicitation to its regulation of other professions and the regulation of accountants in other states). See also Rhode Island Board of Accountancy, 107 F.T.C. 293 (1986).

Fane instituted this lawsuit in an effort to have Florida's prohibition of in-person solicitation by CPAs declared unconstitutional. The Board disputed any constitutional violation created by the proscription. The district court granted Fane's motion for summary judgment and enjoined the Board from enforcing the ban on in-person solicitation by CPAs in Florida. The Board then perfected its appeal to this court.

II. DISCUSSION

The only issue raised by the Board that we need to address is whether the district court correctly determined that Florida's prohibition on in-person solicitation by CPAs is unconstitutional.[5] We review the district court's order granting summary judgment de novo. Akins v. Snow, 922 F.2d 1558, 1560 (11th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 2915, 115 L.Ed.2d 1079 (1991). Conclusions of law rendered upon summary judgment are subject to the same standard of appellate review as any question of law brought on appeal. Morrison v. Washington County, Alabama, 700 F.2d 678, 682 (11th Cir.), cert. denied, 464 U.S. 864, 104

[5]The Board also argues that the district court erred by granting summary judgment in this case. Since we do not find any material factual disputes which would require resolution at trial, we see no merit to that argument. We will, therefore, address only the question of law decided by the district court.

S.Ct. 195, 78 L.Ed.2d 171 (1983), holding mod. on other grounds, Helicopter Support Systems, Inc. v. Hughes Helicopter Inc., 818 F.2d 1530 (11th Cir.1987) (citations omitted).

Fane contends that Florida's prohibition against in-person solicitation by CPAs is an unconstitutional restriction of commercial speech because the restraint does not further the state's interest in regulating the accounting profession, nor is it narrowly tailored to that end. Fane also maintains that the imposition of the ban upon CPAs, but not on other accounting professionals who perform the same tasks, is a violation of equal protection. The Board argues that the ban is necessary to protect a CPA's integrity, independence, and objectivity while performing the attest function.[6] The Board also argues that the ban is a permissible time, place, and manner restriction that is content neutral.

Commercial speech, i.e., expression that is related exclusively to the economic interests of the speaker and audience, is undeniably entitled to substantial protection under the First and Fourteenth Amendments of the United States Constitution.[7] Peel v. Attorney Registration and Disciplinary Comm'n, ___ U.S. ___, 110 S.Ct. 2281, 110

[6]The attest function is the issuance of an independent opinion regarding a client's financial stability based on an audit or review of a clients financial statements. Only CPAs perform the attest function.

[7]The First Amendment, as applied to the states by the Fourteenth Amendment, protects commercial speech from unjustified governmental regulation. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341 (1980).

L.Ed.2d 83 (1990); Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626,105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); Central Hudson Gas & Elec. Corp. v. Public Serv. Commn, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341(1980); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The informational function of advertising forms the basis for the First Amendment's concern for commercial speech. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783, 98 S.Ct. 1407, 1419, 55 L.Ed.2d 707 (1978). Commercial speech furthers the economic interests of the speaker while also assisting the consumer audience. Central Hudson, 447 U.S, at 561-62, 100 S.Ct. at 2348-49. The importance of the dissemination of commercial information is its benefit to consumers and society. Virginia State Board of Pharmacy, 425 U.S. at 764-65, 96 S.Ct. at 1827.

Blanket prohibitions on commercial speech are disfavored. Shapero, 486 U.S. at 476, 108 S.Ct. at 1923. The mere possibility that isolated abuses or mistakes may occur does not justify a total ban on a certain mode of protected commercial speech. Id. Any restriction of commercial speech requires "the government goal to be substantial, and the cost to be carefully calculated." Fox, 492 U.S. at 480, 109 S.Ct. at 3035. For example, the government may ban commercial speech that is more likely to deceive the public

than to inform it, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464-65, 98 S.Ct. 1912, 1922-23, 56 L.Ed.2d 444 (1978), or commercial speech that is related to illegal activity, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). In most other contexts, the First Amendment prohibits regulation based on the content of the speech. Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n, 447 U.S. 530, 537-38, 100 S.Ct. 2326, 2333-34, 65 L.Ed.2d 319 (1980).

In Central Hudson, the Supreme Court articulated the following four-part test for assessing the constitutionality of a restriction on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S.Ct. at 2351. In applying the Central Hudson analysis to Florida's restriction of Fane's commercial speech, the district court found that Florida's prohibition of in-person solicitation by CPAs failed to

advance the governmental interest asserted and was more extensive than was necessary to serve that interest.[8]

In reviewing the validity of Florida's restriction on in-person solicitation by CPAs, we must determine whether there exists a "'fit' between the legislature's ends and the means chosen to accomplish those ends...." Fox, 492 U.S. at 480, 109 S.Ct. at 3035 (quoting Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986)). The relationship between the legislature's means and ends must be reasonable, but does not require perfection; furthermore, its scope must be "in proportion to the interest served." Fox, 492 U.S. at 480, 109 S.Ct. at 3035 (quoting In re R.M.J., 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982)). Florida is not required to employ the least restrictive means to accomplish its ends, but it must utilize "a means narrowly tailored to achieve the desired objective." Fox, 492 U.S. at 480, 109 S.Ct. at 3035. Florida bears the burden of justifying its restrictions. Zauderer, 471 U.S. at 647, 105 S.Ct. at 2279.

The Board attempts to justify Florida's proscription of in-person solicitation by CPAs on the basis of the need to preserve and protect the public's ability to rely on the independence and objectivity of CPAs who are performing the attest function. The Board also contends that because there is no acceptable method of regulating in-person

[8]The first two prongs of the Central Hudson test are met. The speech in which Fane wishes to engage concerns a lawful activity and is not misleading; Florida's interest in regulating the accountancy profession is substantial.

solicitation, a prophylactic rule against its utilization by CPAs is necessary to protect the public. Nowhere in the record, however, do we find that the Board has produced any evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation. Prophylactic restraints on commercial speech based on unsupported assertions or unsubstantiated fears are not acceptable. Zauderer, 471 U.S. at 647-18, 105 S.Ct. at 2279-80. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive." In re R.M.J., 455 U.S. at 203, 102 S.Ct. at 937. The availability to the general public of commercial information such as that Fane seeks to communicate is valuable enough to justify imposing the burden upon Florida of distinguishing "the truthful from the false, the helpful from the misleading, and the harmless from the harmful." Zauderer, 471 U.S. at 646, 105 S.Ct. at 2279. Broad prophylactic rules simply cannot be justified if the protections afforded commercial speech are to remain viable. Id. at 649, 105 S.Ct. at 2280-81.

Even if there were evidence before us to indicate that allowing CPAs who perform audit and review engagements to solicit in-person would undermine the integrity of financial statements, that still would not justify the total prohibition of in-person solicitation by all CPAs. CPAs who specialize in many aspects of the accounting profession have no occasion to attest to the accuracy of audits or financial

statements. If allowed at all, Florida's statute must be narrowly tailored to achieve its anticipated objective.

> A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.

Frisby v. Schultz, 487 U.S. 474, 485, 108 S.Ct. 2495, 2502-03, 101 L.Ed.2d 420 (1988) (citation omitted). Florida's restriction bans far more speech than is necessary in light of the justification offered for its restraint.

If a state can combat wrongdoing by direct means, it cannot use its interest in foreclosing harm to justify broad-scale restraints on speech. Shapero, 486 U.S. at 476, 108 S.Ct. at 1923. Regulatory requirements exist in Florida that can be utilized to preserve the independence of CPAs who perform the attest function. The Board does not offer any explanation as to why those requirements do not adequately afford the protection which it seeks. First and foremost, Fla. Stat. Ann. § 473.315(1) (West 1991) prohibits a CPA from expressing "an Opinion on the financial statements of an enterprise unless he and his firm are independent with respect to such enterprise." Second, CPAs are forbidden from engaging in any kind of fraudulent or deceptive conduct. See Fla. Stat. Ann. § 473.323(1)(f), (k) (West 1991).[9] Third, negligent certification of financial state-

[9]CPAs who violate Florida statutes regulating the practice of public accounting can be punished by penalties ranging from fines to license revocation. See Fla.Stat.Ann. § 473.323(3)(b), (c) (West 1991).

ments could give rise to tort liability. The Florida Supreme Court recently held that in certain circumstances, a CPA can be held liable to those persons whom he "knows" will rely on his opinion, regardless of whether the CPA is in privity with them. First Florida Bank v. Max Mitchell & Co., 558 So.2d 9, 15 (Fla.1990). The Board has the duty to at least explore less intrusive alternatives than a blanket ban on in-person solicitation imposed on all CPAs. Shapero, 486 U.S. at 477-78, 108 S.Ct. at 1923-24. Furthermore, the utilization of an advertising ban to protect the ethical or performance standards of a profession is impermissible. Central Hudson, 447 U.S. at 564 ,100 S.Ct. at 2350. See also Virginia State Board of Pharmacy, 425 U.S. at 769, 96 S.Ct. at 1829.[10]

The Board asserts that speech protected by the First Amendment, whether commercial or ideological, may still be subjected to legitimate time, place, and manner restrictions, so long as those regulations are based on criteria that is content neutral. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983). A time, place, and manner restriction seeks merely to regulate when, where, and how the protected activity may take place. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986). The regulation challenged by Fane does more, however, for it acts as an unqualified ban on in-person

[10]Because we find that Florida's ban is an impermissible restriction of commercial speech in violation of the First Amendment, we need not address Fane's equal protection argument.

solicitation rather than regulating the details of when, where, and how a CPA may engage in such solicitation. Furthermore, a constitutionally permissible time, place, and manner restriction must not be based upon the content of the speech. Consolidated Edison, 447 U.S. at 536, 100 S.Ct. at 2332-33. Florida's regulation of in-person solicitation by CPAs is not content neutral. It is a speaker-specific, unqualified ban on a category of expressive activity. Only CPAs who wish to speak directly to potential clients are restrained. The appropriate bounds of time, place, and manner restrictions on commercial speech are clearly exceeded by Florida's statute.[11]

The Board also argues that its position is supported by Ohralik, 436 U.S. at 447, 98 S.Ct. at 1913 (upholding a ban on in-person solicitation by attorneys) and National Funeral Servs., Inc. v. Rockefeller, 870 F.2d 136 (4th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 409, 107 L.Ed.2d 374 (1989) (upholding a ban on in-person solicitation by funeral directors selling pre-need burial services). The district court

[11]Fane objects to our consideration of the Board's time, place, and manner argument because the Board did not present it to the district court. Although we generally decline to consider a legal theory that was not raised at the district court level, we have the discretion to consider an argument first made on appeal. Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 989 (11th Cir. 1982). We may exercise that discretion if the omitted issue involves a pure question of law and if refusal to consider it would result in a miscarriage of justice. Id. at 989-90. Consideration of legal arguments not presented to the district court is especially appropriate on appeal from summary judgment. Id. at 990. Consequently, we have considered the Board's argument, but find that it has no merit.

concluded that Ohralik and National Funeral Services do not apply to this case because the nature of the accounting profession and its soliciting targets differs in material respects from the legal and funeral services professions and their soliciting targets, making the imposition of such a ban on CPAs unnecessary.

As the majority opinion in Ohralik indicates, and as Justice Marshall's concurrence makes clear, the holding of Ohralik is limited. "[T]he solicitation of business, under circumstances--such as those found in this record--presenting substantial dangers of harm to society or the client independent of the solicitation itself, may constitutionally be prohibited by the State." 436 U.S. at 470, 98 S.Ct. at 1926 (Marshall, J., concurring in part and concurring in the judgment). The majority opinion rests on whether an Ohio attorney disciplinary rule had been constitutionally applied to Ohralik. Id. at 467-68, 98 S.Ct. at 1924-25. Indeed, Ohralik did not challenge the rule on its face, and conceded its constitutionality in some contexts. Id. at 461-62, 466 n.27, 98 S.Ct. at 1921-22, 1924 n.27. Ohralik deals with an outrageous situation in the area of attorney solicitation.[12] Many cases will fall between the extremes of Ohralik and

[12]Ohralik solicited business from two young accident victims, approaching one while she lay in traction in a hospital bed. He employed a concealed tape recorder to assist him in his solicitation efforts and emphasized the contingent nature of his fee to make his offer appear cost-free and irresistible. In addition, he refused to withdraw even when requested to do so by his client and misrepresented himself to her insurance company. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 450-52, 98 S.Ct. 1912, 1915-17, 56 L.Ed.2d 444 (1978).

cases such as NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) and In re Primus, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), where solicitation by attorneys is clearly permitted because of its political expression and association value. Ohralik, 436 U.S. at 471-72, 98 S.Ct. at 1926-27 (Marshall, J.).

We are presented here with such an intermediate case in the context of another class of professionals--CPAs.[13] The possibilities for overreaching, invasion of privacy, exercising undue influence, and outright fraud that the Supreme Court found were cause for concern if lawyers were allowed to solicit in-person are remote in the accounting profession. See Ohralik, 436 U.S. at 464-66, 98 S.Ct. at 1922-24. Solicitation by a CPA does not entail the "coercive force of the personal presence of a trained advocate." Zauderer, 471 U.S. at 642, 105 S.Ct. at 2277. Likewise, the solicitation of a business person by an accountant is in no way comparable to the intrusive solicitation of a family member by a salesperson of funeral services at a time of emotional vulnerability. See National Funeral Services, 870 F.2d at 142-45. We agree with the district court that the ban on in-person solicitation endorsed in Ohralik and National Funeral Services is not necessary to protect the general public from solicitation by a CPA.

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[13]The state interests in Ohralik were found by the Court to be particularly strong because "lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" 436 U.S. at 460, 98 S.Ct. at 1920. Patently, this added concern is not present in this case.

III. CONCLUSION

We do not lightly interfere with a state's power to regulate the professions which practice within it. Nevertheless, the state's regulatory power cannot be used to insulate restrictions of constitutionally protected speech from our review for constitutional infirmity. See Peel, __ U.S. at ___, 110 S.Ct. at 2291-92. In this case, Florida's restriction of in-person solicitation by CPAs does not directly advance the state's asserted interest. The justification offered for the ban could be served equally well by existing regulations imposed on the accounting profession or by a more limited restriction of the protected speech. We therefore affirm the district court's order granting summary judgment in favor of Fane and enjoining the State of Florida from enforcing its ban on in-person solicitation by CPAs.

AFFIRMED.

EDMONDSON, Circuit Judge, dissenting:

States have a strong interest in regulating the practice of professions within their borders. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). Because I believe states are largely free to regulate the professionals which they license, I reach a different conclusion in this case. My view is that Florida's regulation, prohibiting face-to-face solicitation of clients by certified public accountants (CPAs), should stand.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), is extremely persuasive and supports Florida's prohibition against in-person solicitation by CPAs. In Ohralik, the Supreme Court upheld a state regulation prohibiting in-person solicitation of clients by

lawyers. The Court's reasoning focused on the potential harms that face-to-face solicitation poses for prospective clients. Because in-person solicitation inherently opens the door to "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" Id. at 462, 98 S.Ct. at 1921, the Court recognized the need for a state to enact a rule designed to protect lay people. With advertising generally the recipient may simply turn away, but in-person solicitation may exert pressure and often demand an immediate response from the prospective client, who then has less opportunity for reflection. Id. And because in-person solicitation is not visible or otherwise open to public scrutiny, such solicitation is hard to oversee effectively or to regulate. Id. at 466, 98 S.Ct. at 1924. The Court, consequently, recognized the need for a state to adopt a prophylactic measure, such as a ban on in-person solicitation, to prevent harm from occurring. Id. at 464, 98 S.Ct. at 1923.

In upholding the state's prohibition, the Court in Ohralik noted that people contacted in-person might be especially susceptible to a lawyer's pressure since lawyers are "advocate[s] trained in the art of persuasion." Id. at 465, 98 S.Ct. at 1923. But this quoted language was not at the heart of the Ohralik 's reasoning. I think Ohralik's reasoning reaches professionals other than lawyers. After all, not all lawyers are trained advocates; now relatively few lawyers are directly involved in litigation or advocacy roles. In-person solicitation is potentially harmful chiefly because lawyers, as professionals, have (and are perceived by lay people to have) specialized knowledge beyond that of their

solicited clients. The special leverage, or ability to pressure others, that lawyers have is not so much a function of their oratory skill; instead, it stems from the gap in knowledge between the professional and the lay person. The client, when compared to the professional, is almost always unsophisticated when it comes to the subject of the professional's work. The danger lies with the lawyer who intimidates or baits the potential client with the lawyer's specialized knowledge while simultaneously preying on the client's relative ignorance. The result is that the client may be pressed to agree to hire the lawyer for fear of losing out on legal rights and remedies that the client does not fully understand or, because the directly solicited client has little time to compare the fees and qualities of competing lawyers, the client may employ the wrong lawyer or agree to pay too much.

CPAs also have (and are perceived to have) knowledge beyond that of their potential clients which CPAs could well use to entice or to intimidate clients. For example, CPAs provide tax advisory services and financial management services to clients, when many of these prospective clients may be ignorant of their potential rights and of their potential liabilities. To think that clients may be as vulnerable to a seemingly knowledgeable CPA as accident victims are to an ambulance chasing attorney is not unreasonable. In addition, by virtue of having the title "certified public accountant" bestowed upon him by a state, a CPA is cloaked with an aura of competence that can overawe prospective clients (just as easily as a persuasive lawyer could) due to the appearance of special knowledge that is

associated with his state licensure.* In the light of their specialized, professional knowledge, CPAs can be forceful and persuasive. Anyone who has ever signed, without fully understanding, a tax return or other financial statement prepared by a CPA simply because the CPA says "You sign here," knows just how persuasive a CPA can be.

Some differences in the circumstances surrounding solicitation of clients by lawyers and solicitation by CPAs undeniably exist; and, in general, the state's interest in regulating the legal profession (to the extent that lawyers as a group may still be seen as officers of the state's courts) may possibly be a bit greater. But I think for the purpose of constitutional analysis, the two professions are more alike than they are different. For instance, it may well be true that in most audit engagements potential clients of CPAs will not be under the kind of emotional distress that a potential personal injury client would be under when solicited by a lawyer. But nothing said in Ohralik seems to limit rules against in-person solicitation of clients by lawyers to rules barring soliciting personal injury clients in distress. In addition, as the Supreme Court noted in United States v. Arthur Young and Co., 465 U.S. 805, 104 S.Ct. 1495, 79

*In Florida, non-licensed tax preparers, bookkeepers, management advisory consultants and the like are permitted to engage in direct, in-person, uninvited solicitation. These people, however, are neither permitted to perform the "attest function," which is specifically reserved for CPAs, nor to hold themselves out as having that assured special competence and reliability that the title "CPA" gives. For the state to condition its grant of special privilege and standing upon the acceptance of additional restraints, including some prophylactic rules, is not unreasonable.

L.Ed.2d 826 (1984), a client has a great deal to lose, for example, if an auditor gives a qualified, adverse or disclaimed opinion as to the accuracy of a company's financial records. Id. at 818 n.13, 104 S.Ct. at 1503 n.13. As such, while a soliciting CPA may not be in the posture of addressing an injured person, he can easily be in the position of addressing a client who has everything to gain from a glowing, unquestioning opinion, and everything to lose from any less favorable opinion. So, in addition to the problems that lurk whenever professionals are allowed to engage in face-to-face solicitation, there is an incentive for fraudulent CPAs to solicit clients by promising to overlook financial misstatements or by promising to give a favorable review. See Id. at 461, 98 S.Ct. 1921.

We should also recall how hard it is for a state to monitor in-person solicitations. Because of the heavy reliance that the public places in the accuracy of financial statements reviewed by CPAs, Florida Bank v. Max Mitchell & Co., 558 So.2d 9 (1990), and for other reasons that seem to apply to professionals in general, there is a strong state interest that CPAs be prevented from compromising their integrity by soliciting clients underhandedly. And, a ban on in-person solicitation is directly related to that state interest.

In Ohralik, the Court specifically noted that a "state does not lose its power to regulate commercial activity deemed harmful to the public wherever speech is a component of the activity." Ohralik, 436 U.S. at 456, 98 S.Ct. at 1919. Therefore, simply because Florida's regulation involves speech does not mean that the regulation must be struck down on constitutional grounds. The Ohralik Court said that

"procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." Id. at 459, 98 S.Ct. at 1920 (citations omitted). This point is to me the important one.

The First Amendment provides greater or lesser protection to speech depending on its context, that is, whether the speech is political, commercial or something else. The degree of protection afforded commercial speech is toward the low end of the scale. See Ohralik, 436 U.S. at 456, 98 S.Ct. at 1918 ("[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values. . . ."). And, I believe the degree of protection from state interference is still lower when the states are carrying out their traditional and important job of policing the professions. The Ohralik Court specifically recognized that "[w]hile entitled to some constitutional protection," a professional's conduct is "subject to regulation in furtherance of important state interests." Id. at 459, 98 S.Ct. at 1920.

Even if I personally questioned that the Florida rule is necessary for an ordered CPA profession, it would not be my place just to second guess state officials about the state rule's wisdom or effectiveness. What is important for me to see is that reasonable people, such as those that I expect comprise the Florida Board of Accountancy, could think that the rule against in-person solicitation of clients functions to assure greater competence of CPAs, more reasoned selection of CPAs by lay people, and the accuracy of audit statements upon which the public relies. And, even if a less

sweeping rule might do, that circumstance would be of no great significance. I cannot say that the rule Florida has chosen is an unreasonable solution to the problems inherent in uninvited, in-person solicitations of clients for profit. See Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989) (manner of regulating speech need not be "absolutely the least severe that will achieve the desired end"; fit between ends and means need only be "reasonable").

I would uphold the Florida rule as a legitimate use of the state's authority to regulate a profession within its borders and, therefore, would vacate the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3943

SCOTT FANE,

Plaintiff-Appellees,

vs.

FRED H. EDENFIELD, JR., RICHARD J. ABOUD, WHIPPLE VAN NESS JONES, JR., MARGARET F. STROUPE, DEAN F. DENISON, WILLIAM R. MARTIN, JOSEPH R. MILLSAPS, ANTONIO L. ARGIZ, JEROME A. SCHINE, in their official capacities as members, Board of Accountancy,

Defendant-Appellants.

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Bank are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE

*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

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Supreme Court, U.S.
FILED
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No. 91-1594

In The

Supreme Court of the United States

October Term, 1992

FRED H. EDENFIELD, et al.,

Petitioners,

v.

SCOTT FANE,

Respondent.

On Writ Of Certiorari
To the United States Court Of Appeals
For The Eleventh Circuit

PETITIONERS' BRIEF ON THE MERITS

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July 24, 1992

QUESTIONS PRESENTED

1. Whether the State of Florida's interest in maintaining standards among members of the licensed professions validly permits the prohibition of direct, in-person, uninvited solicitation of potential clients by licensed certified public accountants ("CPAs")?

2. Whether the State of Florida's prohibition of direct, in-person, uninvited solicitation of potential clients by licensed CPAs, enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is an unconstitutional restriction of a CPA's First Amendment right of commercial speech?

3. Whether a State's prohibition of direct, in-person, uninvited solicitation of potential clients by licensed CPAs, enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is a valid time, place and manner restriction of a CPA's First Amendment right of commercial speech?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States District Court were: Fred H. Edenfield, Jr.; Richard J. Aboud; Whipple Van Ness Jones, Jr.; Margaret F. Stroupe; Dean F. Denison; William R. Martin; Joseph R. Millsaps; Antonio L. Argiz; and Jerome A. Schine, Petitioners; and Scott Fane, Respondent.

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OPINIONS BELOW

The decision of the United States Court of Appeals, Eleventh Circuit, was rendered on October 30, 1991. *Fane v. Edenfield* is reported at 945 F.2d 1514 (11th Cir. 1991), and is reproduced herein in the Joint Appendix. (JA-86). A Suggestion for Rehearing En Banc was filed by Defendants-Appellants, and was denied on December 31, 1991. This Order is reproduced in the Joint Appendix. (JA-110).

The Order from the United States District Court, Northern District of Florida, was entered on September 13, 1990, and is reproduced in the Joint Appendix. (JA-78).

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of a United States Court of Appeals on a writ of certiorari under Title 28 U.S.C. Section 1254(1). The decision of the Court of Appeals, Eleventh Circuit, was rendered on October 30, 1991, and on December 31, 1991, a Suggestion for Rehearing En Banc[2/] filed with the Court of Appeals was denied. Petitioners subsequently filed a Petition for Writ of Certiorari, which this Court granted on May 26, 1992.

2/ "A suggestion of rehearing *en banc* will also be treated as a petition for rehearing before the original panel." *See* 11th Cir. R. 35-6, and also *Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651, 1662, 109 L.Ed.2d 31 (1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and statutory provisions are set forth in the Appendix.

STATEMENT OF THE CASE

The Petitioners include the State of Florida ("State") and the members of the Florida Board of Public Accountancy ("Board"). Respondent Scott Fane ("Fane") is a Florida certified public accountant ("CPA") who instituted a Section 42 U.S.C. 1983 Complaint in the Gainesville District of the Northern District of Florida in an effort to have Florida's prohibition of direct, in-person, uninvited solicitation by CPAs declared unconstitutional. (JA-1).[1/]

Rule 21A-24.002, F.A.C. (the "Rule"), prohibits the "direct, in-person, uninvited solicitation" of potential new clients.[2/] The Board adopted the Rule to further its legitimate interest in protecting the CPA's image of integrity, independence and objectivity, and to restrict attempts of overreaching or undue influence by regulating the manner in which such solicitation occurs. Uninvited written solicitation is not prohibited by the Rule.

Petitioners asserted the Rule furthers an important governmental interest. When the Florida Legislature enacted

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1/ Florida's regulations do not prohibit direct, in-person, *invited* solicitation, and the state's definition of "invited" is rather broad. For example, a general business discussion during a social gathering invites solicitation. (JA-22).

2/ Section 21A-24.002(2) provides "[a] licensee shall not by any direct in-person, uninvited solicitation solicit an engagement to perform public accounting services...[c] where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication. Section 21A-24.002(3) makes unlawful "any communication which directly or indirectly requests an immediate oral response from the recipient."

Chapter 473, Fla. Stat., regulating the practice of public accounting, it stated its purpose:

> The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

See § 473.301, Fla. Stat.

In order to protect the public perception of the CPA's total independence and objectivity, Florida has determined that direct, in-person, uninvited solicitation would be inappropriate as a method by which CPAs should become engaged to perform services for clients. (JA-20). The issue is thus whether Florida's restrictions on commercial speech, as embodied in the Rule, are constitutional in light of recent Court decisions upholding similar restrictions on attorney solicitation.

Fane alleges the Rule violates his First Amendment rights to commercial speech and limits his ability to compete with other established CPAs as well as with other unlicensed financial professionals such as non-certified accountants, bookkeepers and tax preparers, who are not subject to the Rule.

After stipulation by the parties, the Complaint was transferred to the Tallahassee Division of the U.S. District Court for the Northern District of Florida, and the named defendants were modified to include the members of the Board in their official capacities.

The Board answered the Complaint on October 6, 1988 (JA-7), and on December 8, 1988, Fane moved for Summary Judgment with an affidavit (JA-9). The Board responded to Fane's Motion on January 4, 1988 with an Affidavit (JA-16). Fane replied with a Supplementary Affidavit on January 27, 1989 (JA-25).

Fane argues the Rule is an unconstitutional restriction of his right to commercial speech because his potential clients are typically businessmen who are likely to be sophisticated, and it is unlikely a CPA would engage in any type of fraud, overreaching or other activities which might improperly influence a potential client or compromise the CPA's independence in performing public accounting functions (JA-13). In support of his argument, Fane points to the disciplinary provisions of the Florida Statutes and Rules governing public accounting as well as applicable criminal penalties as adequate restriction to deter CPAs from engaging in collusion or fraud with a potential client. (JA-14, 15). Fane further alleges the Rule denies his right to equal protection since, except for the attest function, i.e., audits or reviews (which he does not wish to perform), all activities of CPAs in the State of Florida may also be performed by non-licensed persons not subject to the Rule. (JA-4, 15).

The Board filed the affidavit of Louis W. Dooner, CPA ("Dooner"), in response to Fane's Motion for Summary Judgment.[3] According to Dooner, "[T]he auditor's independence

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[3] Dooner is a distinguished practitioner who has served the profession of public accounting by holding leadership positions in the Florida Institute of Certified Public Accountants and the AICPA, and has been a member of one of the bodies which set the technical standards of practice for CPAs. Dooner has also acted (continued...)

means that he is so free of his client that he is willing to report the facts as they are found regardless that it may be detrimental to the client. If he has solicited the client he will be beholden to him." (JA-19). Mr. Dooner stated:

> The audit function is too important to the economic well being of this country to allow it to be torn down by a few who want the prestige and public trust their predecessors have earned without being willing to continue to conduct themselves in a manner that will assure the continued integrity of opinions on financial statements. The ban on direct, in-person, uninvited solicitation is for the protection of users of financial statements. It is not to protect the public from solicitors. (JA-20).

According to Dooner, the Rule represents a reasonable restriction upon the manner, not content, of a CPA's solicitation, given that a state otherwise could not regulate such solicitation, and other alternative means of solicitation were available:

> The *only* type of solicitation that a CPA may not engage in is that *that places the potential client in the position of having to make an immediate oral response, thus opening the door to overreaching and vexatious conduct by the CPA, or conversely, and far more damaging to society, the opportunity for the potential client to place the soliciting CPA in a compromising position as part of the bargain reached, since the CPA is obviously in need of business and may be willing to bend the rules. Such activity is not in the best interests of the*

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[3](...continued)
as a regulator of the CPA profession in the State of Florida, and is a past member and chairman of the Florida Board of Accountancy. (JA-1-2).

> *public which is so dependent on independent opinions on financial statements* based on an audit conducted in accordance with generally accepted auditing standards. (Emphasis supplied).

(JA-23).

After hearing oral argument on September 13, 1990, the District Court granted Fane's Motion for Summary Judgment and entered its Order enjoining the Board from enforcing the provisions of Rules 21A-24.002(2), (3) as they apply to CPAs who seek clients through direct, in-person, uninvited solicitation in the business context.

On October 11, 1990, the Board appealed that decision to the Eleventh Circuit Court of Appeals. On October 31, 1991, the Eleventh Circuit Court of Appeals entered its opinion affirming the District Court by a 2-1 vote. (JA-86). The Board filed a timely Suggestion for Rehearing En Banc, which was denied on December 31, 1991. (JA-110).

The Eleventh Circuit Court of Appeals' decision is contrary to a Florida Fourth District Court of Appeals' decision issued immediately before its decision, declaring the same prohibition on in-person, uninvited solicitation constitutional. *See State Dept. of Professional Regulation, Board of Accountancy v. Rampell*, 589 So.2d 1352 (Fla. 4th DCA 1991), *appeal docketed*, No. 79,371. (Supreme Court of Florida, Feb. 17, 1992).

On March 30, 1992, the Board filed its Petition for Writ of Certiorari with this Court which was granted on May 26, 1992. This Brief on the Merits follows.

SUMMARY OF ARGUMENT

Florida has a legitimate, strong interest in licensing and regulating the practice of the learned professions within its borders. The Court of Appeals, in holding Florida's prohibition against direct, in-person, uninvited solicitation by licensed professionals to be unconstitutional, erroneously construed this Court's decision in *Ohralik v. Ohio State Bar Ass'n, infra,* as being limited to attorneys. The Court of Appeals disregarded this Court's decision in *U.S. v. Arthur Young, infra*, which recognizes that the public's perception of the independence and integrity of CPAs is the *sine qua non* of the profession, and that in many engagements, especially those involving tax services such as those Fane seeks to provide, a CPA is just as much involved in a desire to persuade a client to engage him as is an attorney. In short, the elements that led this Court in *Ohralik, infra*, to permit the State to prohibit categorically direct, in-person, uninvited solicitation of prospective clients by attorneys are present within the context of the accounting profession as to solicitations by CPAs.

This Court's holdings in *Ohralik, infra, Shapero, infra* and *Zauderer, infra,* address the inherent impossibility of regulating non-memorialized direct, in-person solicitation contacts. The prophylactic rule at issue forms the only practical barrier by which the State can attempt to regulate a practice which it legitimately deems to be a threat to the profession and its consuming public. Since the State bans only "cold call solicitation", and permits CPAs to engage in all other forms of non-fraudulent advertising, there are ample alternatives for a CPA to seek out prospective clients.

The Board's Rule prohibiting direct, in-person, uninvited solicitation by CPAs is thus a legitimate use of a state's authority to regulate a profession, and is facially constitutional. The Rule

satisfies the requirements set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, infra*. As prescribed in *Central Hudson*, a governmental regulation on commercial speech will be upheld if:

(1) It regulates commercial speech as defined by this Court;

(2) It promotes a substantial governmental interest;

(3) It directly advances that interest; and

(4) Commercial speech is burdened no more than necessary to promote the substantial governmental interest. *Id.*

Reasonable time, place and manner restrictions may be imposed by States where, as here, the restrictions are justified without regard to the content of the commercial speech, are narrowly tailored to serve that interest, and leave open ample alternative methods for communication. *Barnes v. Glen Theatre, Inc., infra*. The Court of Appeals erred here in holding the Rule was not a reasonable time, place and manner restriction.

The central question to validating a time, place and manner restriction is whether the Rule was enacted because the government disagrees with the content of the speech as opposed to only the time, place and manner of its dissemination. Florida does not prohibit any CPA from disseminating truthful information about his/her practice, including the solicitation of prospective clients, as long as the solicitation is memorialized. Thus, the Rule is concerned only with the manner of communication, not the content. Only by banning this manner of communication can the professionalism of CPAs be assured, especially in light of the impracticability of less onerous forms of regulation. The Rule is thus justified not based upon the content of the speech, but upon the conduct surrounding the speech and the secondary effects thereof, much as was noted by this Court in *Metromedia, Inc. v.*

City of San Diego, infra, and in *Ohralik, infra*; the banning of this type of professional solicitation is legitimate, whether under a full-fledged commercial speech, or a time, place and manner analysis.

ARGUMENT

I. The State Has A Special Responsibility For Maintaining Standards Among Members Of The Licensed Professions, and A Ban On Verbal Cold-Call Solicitation By CPAs Is Within The Permissible Scope of A State's Regulation.

Without question, the controlling case here is *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) ("*Ohralik*"), a case in which this Court affirmatively answered a part of the question reserved in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977) and held a state may constitutionally discipline a lawyer for soliciting clients in person. The only question before this Court, as well as the courts below, is the meaning of *Ohralik* as applied to CPAs. There are essentially two possible meanings, and whichever meaning is intended will control the decision today in this case:

1) The first possible meaning, which Petitioners believe the decision itself and subsequent interpretation of the case indicates to be its meaning, is that State agencies with authority to regulate the learned professions have the authority, at least when they give reasonable alternatives, to prohibit face-to-face[4/] uninvited

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[4/] The term "face-to-face" as used in this brief is intended to encompass any direct, personal communication, whether in person or over a telephone, the paradigm of which is the "cold call".

verbal solicitation of prospective clients. If this is the case, the agencies have the right to proscribe this type of solicitation in the name of the professional standards the State has required them to impose and whether or not the specific solicitation is or is not false, fraudulent, or otherwise subject to censure. In other words, the State is permitted to deal with the potential, as well as the actual harm, and may impose a "prophylactic device to halt a potentially misleading statement";[5/] or

2) The second possible meaning is to restrict *Ohralik* to the most negative interpretation of its facts, and assume that Ohio's censure of the face-to-face, uninvited (at least as to one of the clients of Ohralik described in the *Ohralik* opinion) verbal solicitation was honored only because of those facts and the peculiar abilities of attorneys to advocate, distort, and overbear reasoned judgment.

If the correct reading of *Ohralik* is the latter, then one is hard pressed to hypothesize in the average CPA an equivalent ability to advocate, distort and overbear reasoned judgment, and the facial challenge to the constitutionality of the Board's prohibition of face-to-face uninvited solicitation which the District Court and Court of Appeals sanctioned should probably be sanctioned again by this Court. But if the correct reading of *Ohralik* is the former, then both the District Court and the Court of Appeals erred, and this Court should reverse and approve the Board's Rule prohibiting such solicitation.

[5/] "The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs." *Ohralik, supra*, at 436 U.S. 464, 98 S.Ct. 1923, 56 L.Ed.2d 458-59.

Ohralik involved a request for review of the determination of the Ohio Supreme Court that the Ohio State Bar Association could disbar one of its members for face-to-face uninvited verbal solicitation. The solicitation involved the successful effort by Ohralik to represent two 18-year-old individuals involved in a motor vehicle accident caused by a third party. The solicitation of the first individual occurred in the hospital while she was in traction, and the solicitation of the second individual occurred just after she was released from the hospital. The possibility existed that the interests of the victims were in conflict and, in fact, Ohralik had given conflicting advice to the two of them (or their representatives).

The Ohio Supreme Court, however, did not focus on any of these "special" facts in determining the lawyer should be disbarred. Nor did the question presented by either Ohralik or the Ohio State Bar Association focus on such "special" facts. Rather, both presented the question dispassionately as to the right of the State to prohibit face-to-face uninvited professional solicitation. This Court likewise appeared to focus on that question, rather than the "special" facts. *Ohralik, supra*, at 436 U.S. 449, 98 S.Ct. 1915. Subsequent decisions of this Court also appear to say that *Ohralik* permitted a State professional licensing agency to prohibit any face-to-face uninvited personal solicitation by any attorney for any purpose. *See, e.g, Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990).

These appear to be the salient conclusions that can be drawn from *Ohralik*, as construed by subsequent decisions of this

Court, as well as the prior non-commercial speech decisions of this Court which preceded *Ohralik*:

> (i) States have a right to a genuine concern about the policing of learned professions,[6] i.e., professions for which the State has set up a licensing scheme, including testing for competence to perform that profession's work and the establishment of standards of performance and conduct.[7]

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[6] While the Court in *Bates* determined that truthful, restrained advertising of the prices of 'routine' legal services would not have an adverse affect on the professionalism of lawyers, this was only because it found 'the postulated connection between advertising and the erosion of *true professionalism* to be severely strained.' 433 U.S., at 368, 97 S.Ct. at 2691, 53 L.Ed.2d 810. . . . The *Bates* Court did not question a state's interest in maintaining high standards among licensed professionals. Indeed to the extent that the ethical standards of lawyers are linked to the service and protection of clients, they do further the goals of 'true professionalism.' [Emphasis original in *Ohralik*]

Ohralik, 436 U.S. at 460-61, 98 S.Ct. 1921, 56 L.Ed.2d 456.

[7] *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572, 588 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad powers to establish standards for licensing practitioners and regulating the practice of professions"); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935).

> (ii) Solicitation by a learned profession is simply one form of advertising. All advertising is commercial speech, which, although certainly entitled to First Amendment protection,[8] is subject to regulation by government to a far greater degree than political and other forms of non-commercial speech.
>
> (iii) Solicitation by a learned profession, and other forms of advertising which are in writing, are subject to content review after the fact. Therefore, to the extent there is a concern about whether that content is fraudulent or otherwise misleading, the solicitor may be disciplined after the fact for that conduct. That being the case, the state regulator generally[9] is limited to after-the-fact review

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[8] To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. *Ohralik*, 436 U.S. at 456, 98 S.Ct. at 1918.

[9] Other forms of limitation are also acceptable, as the Court noted in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 506, 101 S.Ct. 2882, 2891-92, 69 L.Ed.2d 800, 813-14 (1981) (validating governmental power to ban commercial off-site billboards, while invalidating an ordinance that prohibited noncommercial billboards as well):

> [C]ommercial and noncommercial communications, in the context of the First Amendment, have been treated differently. *Bates*

(continued...)

thereof, and appropriate sanctioning for misconduct in its use.

(iv) Verbal solicitation is essentially unregulatable because there is no simple way to determine what was said. Therefore, a state regulator is permitted to simply prohibit all verbal, uninvited[10/] face-to-face solicitation. Certainly after-the-fact review is limited to hearing testimony of the speaker and the person spoken to. This is hardly simple and only in the rare case will the parties to the speech agree

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[9/](...continued)
v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), held that advertising by attorneys may not be subject to blanket suppression and that the specific advertisement at issue there was constitutionally protected. However, we continue to observe the distinction between commercial and noncommercial speech, indicating that the former could be forbidden and regulated in situations where the latter could not be. *Id.* at 379-381, 383-84, 97 S.Ct., at 2706-09.

The general right to limit certain forms of commercial speech for good reason, such as was the case in *Metromedia*, would apply to written speech by a member of a learned profession as simply one form of commercial speech.

[10/] In *Ohralik* one of the clients actually may have invited the solicitation. Ohralik appears to have seen the parents of the client first and may have been invited by the parents to call on the 18-year old client in the hospital. Therefore, *Ohralik* may be read to permit state prohibition of an *invited* verbal face-to-face solicitation. However, the Florida Statute and the Rule of the Florida State Board of Accountancy before this Court prohibit only uninvited communication and therefore the right of the State to prohibit invited verbal solicitation is not here raised.

on what was said and such matters as the intonation of the speaker. There is no practical way to "freeze" the speech unless the speaker tapes the entire conversation and preserves the tape for a defined period.[11/]

(v) The result of this set of rules is that the licensed professional may make an uninvited solicitation in writing, subject to whatever legitimate controls over format and retention the state regulator may establish, but that licensed professional may be prohibited by the state from uninvited verbal face-to-face solicitation.[12/] The

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[11/] But in Ohralik's case, he did tape at least two of his conversations and he did preserve the tape (although he appears to have done so largely to prove the existence of a contingent fee contract with the client), and this Court ignored that fact in reaching its decision that Ohralik could be punished by the regulator for making the verbal solicitation. One difficulty of any such "freeze" rule is reflected in *Ohralik* itself, that of ensuring that *all* the conversation is on tape. One of the clients in *Ohralik* disputed that the entire conversation had been taped.

[12/] The State's perception of the potential for harm in circumstances such as those presented in this case is well founded. The detrimental aspects of face--to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission, and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under
(continued...)

> State may exercise this right of prohibition because it believes that form of solicitation is inherently unprofessional or because it believes it simply can not effectively regulate it after-the-fact.

Some of the evils noted in *Ohralik*, 436 U.S. at 461, that can be ameliorated by the prevention of direct, in-person, uninvited solicitation are not applicable to the practice of public accountancy--such as the chasing of ambulances. Others however, such as the assertion of fraudulent claims, the debasing of the profession and potential harm to the client or the public involved in overreaching, overcharging, underrepresentation or misrepresentation, all are powerful and compelling arguments in favor of prohibiting such forms of solicitation in public accountancy.

[12/](...continued)

> circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes. Under such circumstances, it is not unreasonable for the state to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited. [Footnotes omitted]

Ohralik, supra at 436 U.S. 464-66, 98 S.Ct. 1923-24, 56 L.Ed.2d 459-60.

In light of the foregoing, what would be the fate of Florida's regulation if this Court were to limit *Ohralik* to specific types of uninvited face-to-face solicitation, based on the factual likelihood of it being misleading or overbearing, or on the condition of the person solicited, such as the 18-year-old females recently traumatized, one of whom was still in the hospital? The application of *Ohralik* to the funeral director may fit into this kind of context. Obviously, the CPA would only rarely do so, although anyone who has to see an auditor or investigator from the Internal Revenue Service may deem himself or herself in a traumatic state.

If a justification is required for the prohibition of uninvited face-to-face solicitation, what is that justification? The CPA may perform a variety of functions, but clearly the most significant are the "attest" function and the tax function.[13/]

[13/] The Court in *Ohralik* found that a lawyer who engages in personal solicitation may be more inclined to subordinate his client's best interest to his own pecuniary interest. The Court also held that "[t]hese lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest." 436 U.S. at 461. Such a concern is inherent in the public accountancy profession as well. A CPA soliciting a client for a tax engagement wherein he will act as an advocate on behalf of the client acts in a manner similar to that of an attorney pressing a client's claim in court.

In the practice of public accountancy, the same "special problems of conflict of interest" arise if a CPA is involved in soliciting an audit client. Although it may be less likely that a potential audit client will be seduced or intimidated into hiring a CPA as a result of an in-person solicitation, the potential for collusion is very real, and it is in the public's perception of a CPA as an independent outside observer and an opiner on the truth and

(continued...)

The Attest Function

American business and the American public depend on satisfactory performance by CPAs of the so-called "attest" function, in which the CPA "attests" that the financial statements of a business are prepared in accordance with generally accepted accounting principles ("GAAP"). To do this, the CPA must be "independent" of the business which is audited, a term defined in essentially the same fashion by the Florida State Board of Accountancy[14] and the United States Securities and Exchange Commission.[15] Only certified public accountants can perform this function and its importance has been recognized by this Court.

In *U.S. v. Arthur Young & Co., supra*, at 465 U.S. 817-18, 104 S.Ct. 1503 (prohibiting CPAs from retaining certain records because of the necessity of preserving actual and perceived independence) the Court described the function and importance of a CPA performing the attest function:

> An independent certified public accountant performs a different role [than an advocate or confidential advisor]. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This 'public watchdog' function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations. [Emphasis original.]

That the State, which regulates the licensed professional who performs this very significant function, would wish to police in an effective manner an uninvited solicitation to establish the

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[12](...continued)
accuracy of financial statements which justifies the profession's licensure. *See Florida Accountants Ass'n v. Dandelake*, 98 So.2d 323 (Fla. 1957). This protection of the public's perception of a CPA as being independent is singular justification for prohibiting a form of soliciting employment that this Court has found may "create special problems of conflict of interest." Other activities of a CPA are also regulated and the rule on solicitation is an integral part of this larger overall regulatory scheme. Any CPA is subject to the disciplinary provisions of Sections 473.322 and 473.323, Fla. Stat., whether he is performing the attest function or merely using his accounting skills in the preparation of tax returns or acting as a financial advisor. Also, activities of a CPA are subject to a partial prohibition on contingent fees (Section 473.319, Florida Statutes) and the taking of commissions (Section 473.3205, Fla. Stat.). All of these regulations apply to all activities of CPAs which involve the use of their accounting skills, and are evidence that the intent of the Florida Legislature is to protect the integrity and objectivity of CPAs in all their endeavors.

[14] Rule 21A-21.001, F.A.C.

[15] *See* Section 601, Codification of Financial Reporting Policies, *Fed. Sec. L. Rep. (CCH)*, ¶ 73, 251.

"attest" function relationship seems simple common sense.[16] For the State to make the decision that the relationship, when initiated at the instance of the licensed professional, should be in writing rather than verbal is certainly reasonable. To suggest that the State should be limited to an after-the-fact determination, initiated almost certainly on complaint of who said what to whom, when and in what tone is nonsensical, and if the First Amendment compels it, then the First Amendment compels a nonsensical result.

The Tax Function

CPAs are not the only persons who perform the tax function, that is, the preparation of tax returns and the appearance before the Internal Revenue Service on behalf of a taxpayer. So do attorneys and so do enrolled agents, who are persons whom the Internal Revenue Service specifically enrolls after evaluation of their credentials and ability to perform the tax function (not necessarily attorneys or CPAs). The fact that some States do not prohibit direct, in-person, uninvited solicitation by CPAs does not invalidate the judgments of the States that do prohibit such solicitation. When acting as "laboratories of democracy," the

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[16] As noted by this Court in *Arthur Young, supra*, CPAs in many circumstances have duties not only to their clients, but also to the public which relies upon the integrity and impartiality of a CPA's opinion. In this sense, a CPA is similar to an attorney, who functions as an "officer of the court." Just as an attorney, a CPA may be a self-employed businessman; however, just as an attorney "acts as a trusted agent of his client and as an assistant to the court in search of an appropriate solution to disputes," so too does a CPA act as an "umpire" in many of his engagements, especially when announcing an impartial ruling as to the accuracy of a client's financial statement. *See Ohralik, supra*, at 436 U.S. 460, 98 S.Ct. 1920, 56 L.Ed.2d 456.

various States are entitled to "broad latitude" in exercising their traditional power to regulate learned professions and to protect the public and the profession from abuses. *See Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. at 2297-98 (O'Conner, J., dissenting).[17]

States are permitted by *Ohralik* to prohibit uninvited face-to-face solicitation of clients by attorneys for the performance of any aspect of the tax function. There is no possible reason for States *not* to be permitted to make the same prohibition of CPAs. In fact, the rules of the Internal Revenue Service prohibit *all* uninvited solicitation, whether written or verbal, of clients for performance of the tax function.[18]

Other Functions

Concededly, CPAs perform functions other than the "attest" function and the tax function. Accountants may engage in various types of consulting activities. Assuming the State must justify its prohibition of uninvited face-to-face solicitation, what justification is there for prohibiting such solicitation of services other than the "attest" and tax functions? The justification is simple: direct, verbal solicitation is unregulatable because the regulator cannot know what was in fact said, or the tone and

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[17] Interestingly, the Internal Revenue Service, in considering amendments to its rules in light of this Court's decisions in *Zauderer, supra*, *Peel, supra*, and *Shapero, supra*, deleted the term "certified" before enrolled agent, believing that the term could be confused with the much more extensive certification process required of CPAs.

[18] This, of course, goes further than the Florida rules and regulations here at issue, because the Florida rules permit uninvited written solicitation.

manner in which the statement was delivered. Because the regulator does not know what was said, he cannot know what particular function formed the basis for the solicitation. Certainly the regulator need not so minutely parse the justification for its regulations.

Similarly, the State's interest in preventing harm before it occurs justifies the imposition of a prophylactic rule against direct, in-person, uninvited solicitation for pecuniary gain on the part of CPAs. Only by preventing such contacts before they occur can the state prevent fraud, overreaching or misrepresentation (more likely when a CPA is engaged in tax representation, financial or management advisory services), or decrease the likelihood of conflicts of interest (more likely when a CPA solicits a client in an effort to obtain an engagement to perform an independent audit or other attest function). In any event, whether the governmental interest being served is the prevention of consumer fraud by CPAs seeking new tax clients, or the maintenance of the reality and perception of CPAs acting as independent, impartial analysts of a business entity's financial statements, a prophylactic rule banning direct, in-person, uninvited solicitation directly advances vital societal concerns.[19]

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[19] Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as 'a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud.' *Zauderer, supra*, at 471 U.S. 641, 105 S.Ct. at 2277. *See Ohralik, supra*, at 436 U.S. 457-58, 464-65, 98 S.Ct. at 1919-20, 1922-23.

(continued...)

Ohralik, supra, *Zauderer, supra* and *Shapero, supra*, make it crystal clear that the State's ability to ban the solicitation at issue in the instant case as a result of the inherent inability to regulate such solicitation and the profound potential for abuse outweigh the CPA's interest in the potential employment that may be gained through cold-call verbal solicitation. The prohibition is appropriate notwithstanding the type of engagement sought, the degree of sophistication, business acumen, education or knowledge of the potential client, or even the good faith and honest effort of the vast majority of practitioners.[20]

II. The State's Ban On Verbal Cold-Call Solicitation Is A Reasonable Restriction Upon The Commercial Expression of CPAs, And Is Not Facially Unconstitutional.

Fane's Complaint is a direct facial attack upon a rule that impacts upon commercial expression. The Board, however, has not applied the Rule herein to any specific activities of Fane, and his standing is established only insofar as he is a Florida-licensed CPA who is governed by the Rule and who desires to engage in solicitation to expand his tax and management advisory services practice. (JA-9-11). *See Board of Airport Comm'rs of Los Angeles*

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[19](...continued)
Shapero, supra, at 486 U.S. 475, 108 S.Ct. 1922, 100 L.Ed.2d 485.

[20] "The relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." *Shapero, supra*, at 486 U.S. 474, 108 S.Ct. 1922, 100 L.Ed.2d 485.

v. Jews for Jesus, Inc., 482 U.S. 569, 574, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500, 507 (1987).

Fane's facial challenge asserts the Rule is "invalid *in toto*--and therefore incapable of any valid application." *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505, 523 (1974). When evaluating a facial challenge to a state law or regulation, the Court must consider any limiting construction that a State or local enforcement agency has proffered. *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222, 228 (1972).[21/] As the Court noted in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362, 369 (1982):

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The Court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. (Footnotes omitted).

The Court has rejected challenges to restrictions on commercial speech on grounds of the overbreadth doctrine. As noted in *Bates v. State Bar of Arizona*, 433 U.S. 350, 380, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810, 834 (1977), "the justification of the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." *See San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 538, 107 S.Ct. 2971, 2981, 97 L.Ed.2d 427, 448 (1987).

There is no evidence or assertion here that the Rule impacts noncommercial speech at all, so as to justify the imposition of the overbreadth doctrine to its terms. Similarly, there is no assertion the Board ever construed the Rule in such a manner so as to limit noncommercial speech in violation of the analysis set forth in *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978).[22/] As such, there is no "realistic danger that the statute itself will significantly compromise recognized First Amendment

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[21/] In *State Department of Professional Regulation, Board of Accountancy v. Rampell*, 589 So.2d 1352 (Fla. 4th DCA 1991), *appeal docketed*, No. 79,371 (Supreme Court of Florida, February 17, 1992), a state appellate court upheld the Rule against a facial attack on its constitutionality under the First Amendment to the United States Constitution. *See Rampell* at 1353-58. At the same time, the appellate court invalidated a state statute prohibiting competitive bids by CPAs on attest engagements. *Id.* at 1358-60. The Board has appealed to the Florida Supreme Court the lower court finding that the competitive bidding statute was unconstitutional. The CPA who challenged the Rule has also sought review of that decision by the Florida Supreme Court. Under the Florida Rules of Appellate Procedure, however, the Florida Supreme Court exercises discretionary authority to review orders of appellate courts declaring a state statute or rule to be constitutional. *See* Rule 9.030(a)(2)(A)(i), Fla. R. App. P., as opposed to appeals of decisions of appellate courts declaring statutes unconstitutional where there is an appeal of right. *See* Rule 9.030(a)(1)(A)(ii), Fla. R. App. P.

[22/] Section 473.323(1)(l), Fla. Stat. (the statutory authority for the rule) limits its application so as not to impact expression "to the extent that such solicitation constitutes the exercise of constitutionally protected speech."

protection of parties not before the Court." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772, 784 (1984). Fane cannot complain of such here, nor, in light of his obvious desire to engage in conduct which is clearly within the parameters of the Rule, can he claim the Rule is vague.

This Court has adopted a four-prong test in its general analysis of the constitutionality of governmental restrictions on commercial speech, whether or not such restrictions involve licensed professionals. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341, 351 (1980). First, the speech at issue must involve a lawful activity and not be false, fraudulent, deceptive or misleading. Second, the restriction on commercial speech must serve a substantial governmental interest. Third, the regulation must directly advance the asserted governmental interest. Fourth, the regulation must be no more extensive than necessary to achieve the government's interest.[23] The Board's Rule fits

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[23] The fourth prong of the Central Hudson test does not involve a requirement that the regulation be the "least restrictive means" necessary to achieve the governmental interest asserted. In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Court specifically rejected any requirement which would mandate that the governmental regulation be the least restrictive regulation possible, and determined that there must be a "reasonable fit" between the government's asserted purpose and the means by which the government chooses to accomplish that purpose. The Court held that if the State makes a reasonable effort to differentiate harmless from harmful commercial speech, then the regulation will be sustained if the regulation's impact is in reasonable proportion to the interest asserted. *Id.*, at 492 U.S. 476-78, 109 S.Ct. 3033-35, 106 L.Ed.2d 401-02.

squarely within the parameters of the four-prong test.

In this case, the Board does not assert that all CPA solicitation of potential clients is either illegal or necessarily misleading. The State and the Board already permit multimedia advertising as well as various forms of solicitation of clients as set forth in the rules governing the practice of public accountancy in the State. See Rule 21A-24.001, F.A.C. Direct, in-person, uninvited solicitation, however, is without doubt a mode of communication wherein the potential for harm is well founded.[24]

As discussed, the State, along with the United States Department of Treasury, realize the problems associated with direct, in-person, uninvited solicitation by CPAs, and have found such solicitation to be inappropriate.[25] In the rules governing

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[24] Direct, in-person solicitation is a practice "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." *Zauderer v. Office of Disciplinary Counsel, supra*, 471 U.S. at 641, 105 S.Ct. at 2277, 85 L.Ed.2d at 666, citing *Ohralik, supra*, 436 U.S. at 464-65, 98 S.Ct. at 1922-23, 56 L.Ed.2d at 458-59. "Face to face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation . . . . The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase . . . ." *International Society for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992).

[25] By statute, Georgia, (Ga. Code Ann. § 43-3-35(i), (1988) and Texas (Tex. Rev. Civ. Stat. Ann. art. 41A-1, § 6(a)(2), (1991) (allegation of restraints on advertising and solicitation of violating antitrust law dismissed on grounds that state legislature had (continued...)

practice before the Internal Revenue Service, the Director of Practice has specifically included CPAs as among those qualified practitioners for whom such solicitation is banned. *See* 31 C.F.R. § 10.30.[26/]

> No attorney, certified public accountant, enrolled agent or other individual eligible to practice before the Internal Revenue Service shall make, directly or indirectly, an uninvited solicitation of employment, in matters related to the Internal Revenue Service. Solicitation includes, but is not limited to, in-person contacts, telephone communications, and personal mailings directed to the specific circumstances unique to the recipient. This restriction does not apply to: (i) Seeking new business from an existing or former client in a related matter; (ii) solicitation by mailings, the contents of which are designed for the general public; or (iii) noncoercive in-person solicitation by those eligible to practice before the Internal Revenue Service while acting as an employee, member, or officer of an exempt organization listed in Sections 501(c)(3) or (4)8 of the Internal Revenue Code of 1954 (26.U.S.C.).

[25/](...continued)
approved the restraints), prohibit such solicitation. Several other states prohibit such in-person solicitation by rule, as noted by the Eleventh Circuit Court of Appeals in *Fane v. Edenfield, supra*, 945 F.2d at 1514.

[26/] The Department of the Treasury has proposed amendments to its rules governing advertising and solicitation of those practicing before the Internal Revenue Service. *See* 56 Fed. Reg. 16, 289-91 (1991); however, these modifications address advertising and do not include any change in the ban on direct, in-person, uninvited solicitation *after* the Department reviewed this Court's pronouncements on in-person solicitation bans.

With respect to the second prong of the Central Hudson test, it is unquestioned that States have a legitimate and overriding interest under the police power in regulating the practice of public accountancy. See *Heller v. Abess*, 184 So. 122 (Fla. 1938), *Mercer v. Hemmings*, 170 So.2d 33 (Fla. 1964), *U.S. v. Arthur Young & Co., supra*, 465 U.S. at 817, 104 S.Ct. at 1503, 79 L.Ed.2d at 836.

As discussed, the State is directly concerned with the perception as well as the reality of CPAs gaining clients by a manner of solicitation which is inherently unregulatable, and which lessens the public's perception of the CPA as an independent arbiter of the legitimacy of a business entity's financial statements. Similarly, when a CPA acts as an advocate on behalf of the client, as in matters before the Internal Revenue Service and various other state and federal taxing authorities, there is an obvious concern that not only will the professionalism of the CPA be called into question, but also that acts of fraud or overreaching are likely to occur when the CPA solicits an unsuspecting consumer.[27/]

[27/] The Board draws the Court's attention to "A Report on the Special Committee on Solicitation by the American Institute of Certified Public Accountants" and "A Survey on Prohibitions on Advertising and Solicitation Prepared for the American Institute of Certified Public Accountants." The "Special Committee referred to in the "Report" was commissioned by the AICPA in 1979-81 to review the AICPA's ban on *all* forms of direct solicitation of clients by CPAs. See Rule 502 AICPA Code of Professional Ethics (1980) (JA-45). The Special Committee's report led to the AICPA's rescinding its prohibition on such solicitation in 1981. (*See* Affidavit of Dooner). (JA-20-21).

The "Survey," however, addressed other forms of solicitation on the part of CPAs in addition to the direct, in-person, (continued...)

In any event, the State's asserted governmental interest in regulating a learned profession includes not only the prevention of abuses on the part of CPAs, but also the maintenance of true professionalism among CPAs practicing their profession. The Rule thus meets the second prong of the Central Hudson test.

The prohibition of direct, in-person, uninvited solicitation by CPAs of potential clients directly advances the State's interests in the protection of clients and the public from improper, unregulated actions on the part of CPAs engaged in such solicitation, as well as the maintenance of "CPAs' true professionalism" and high standards of independence and integrity.[28] The Rule thus meets the third prong of the Central

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[27](...continued)
uninvited solicitation complained of here and shows the ambivalence of the CPA profession as to its decision to remove the ban. (JA-55-56). Nearly two-thirds of the CPAs responding to the "Survey" had grave difficulties with uninvited solicitation in any form. The membership of the AICPA strongly agreed with the concept that "solicitation causes unsophisticated people to make decisions about CPA services that are not based upon their own objective choice" and that such solicitation will "reduce the public's expectation of the quality of CPA services." (JA-58).

Based primarily on antitrust concerns, however (*see National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978)), the AICPA voided its ban on direct, uninvited solicitation in 1981. (JA-34-35). *See also* Affidavit of Dooner. (JA-20-21).

[28] While the primary basis for the regulation is rooted in the protection of the professional standards of CPAs, and in the impracticability of other forms of regulation, it is clear that the State has an interest in protecting any potential client of a CPA from overreaching, undue influence or vexatious conduct during a (continued...)

Hudson test.

Finally, as previously discussed, the Rule prohibits only direct in-person solicitation; any other alternative forms of nonfraudulent solicitation are available to those who wish to solicit new clients. The Rule thus complies with the fourth prong of the Central Hudson test.

III. The State's Ban On Verbal Cold-Call Solicitation By CPAs Is A Reasonable Time, Place And Manner Regulation Of A Form Of Commercial Speech.

Rule 21A-24.002, F.A.C., is a reasonable time, place and manner regulation of a form of commercial expression that is within the legitimate power of a state government. The Rule serves a substantial governmental interest, is content neutral, and

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[28](...continued)
solicitation. *See Ohralik, supra*. Thus the State's interest in protecting the privacy of potential CPA clients extends even to those solicitations where the CPA attempts to obtain business in professional activities other than the attest function, e.g., tax preparation or financial advice. The protection of one's right to privacy from certain modes of solicitation where vexatious conduct can occur and is inherently unregulatable, such as direct, in-person, uninvited solicitation, has long been recognized as a valid basis upon which solicitation may be regulated, *see National Funeral Services, Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989); *Guardian Plans, Inc. v. Teague*, 870 F.2d 123 (4th Cir. 1989) (upholding rules prohibiting "at-need" solicitation of potential clients by funeral directors); *International Society for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992) (upholding rules prohibiting solicitation in airports). This justification was cited at length by the Florida Fourth District Court of Appeal in its Opinion upholding the Rule at issue here in *Rampell, supra*, at 1357.

leaves open ample alternative means of communication with potential clients. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346, 364 (1976).

All activities protected by the First Amendment, whether commercial or noncommercial in nature, have traditionally been subject to legitimate time, place and manner restrictions. The Court has accorded such regulations greater deference than regulations of speech aimed at the content of the speech. *Perry Educational Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). At one time, the Court intimated that time, place or manner restrictions and the test for evaluating such restrictions on expression might be limited to activities that take place only on public property and that reach the status of a public forum. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989). The Court has now, however, clearly enunciated that time, place and manner restrictions on expression can be applied to the private sector as well. *See Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504, 511 (1991); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The Court, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), opined that the test to be used in determining whether a regulation is a valid time, place or manner restriction of expression protected by the First Amendment is set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968):

> This Court has held that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental

> interest in regulating the 'nonspeech' element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imposition inheres in these terms, we think it is clear that the government regulation is sufficiently justified, if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [Footnotes omitted.]

O'Brien, supra, at 391 U.S. 376-77, 88 S.Ct. 1678-79, 20 L.Ed.2d 672.

Florida's Rule prohibiting direct, in-person, uninvited solicitation by CPAs meets the O'Brien test. As discussed, it is unquestioned that a state may constitutionally regulate conduct by members of the licensed professions. *See Ohralik, supra*, at 436 U.S. 460, 98 S.Ct. 1920-21, 56 L.Ed.2d 456. Furthermore, the State has a legitimate interest in preserving the actual and perceived independence and integrity of CPAs and in protecting the public from dishonest or incompetent practitioners. *See United States v. Arthur Young & Co., supra*, 465 U.S. at 811-21, 104 S.Ct. at 1499-1504, 79 L.Ed.2d at 832-38.[22]

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[22] "It is therefore not enough that financial statements *be* accurate; the public must also *perceive* them as being accurate. Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an (continued...)

The third prong of the O'Brien test requires the interest served by the regulation to be justified without reference to the content of the regulated speech. *See City of Renton, supra*, at 475 U.S. 48, 106 S.Ct. 929, 89 L.Ed.2d 38. It is fundamental that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal, merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834, 843 (1949).

Valid time, place and manner restrictions can be *directed* toward expression involving a particular topic without being deemed impermissible.[20] Thus, in *City of Renton, supra*, and *Barnes v. Glen Theatre, supra*, the Court upheld regulations which impacted particular forms of expression because the regulations were aimed at the secondary effects of the expression on either the public morals (*Barnes, supra*) or the public safety of the

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[20](...continued)
independent professional." [Emphasis original.] See *Arthur Young, supra*, at 465 U.S. 819, 104 S.Ct. 1504, 79 L.Ed.2d 837.

[21] As noted by Justice Stevens, "any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment, knows that it is incorrect to state that a 'time, place or manner restriction' may not be based upon either the content or subject matter of speech." *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 544-45, 100 S.Ct. 2326, 2337-38, 65 L.Ed.2d 319, 333 (1980), (Stevens, J., concurring).

surrounding community (*City of Renton, supra*).[22]

Direct, in-person, uninvited solicitation offers special dangers[23] that cannot be effectively controlled through any other "less onerous forms of regulation" than absolute prohibition.[24]

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[22] The Eleventh Circuit Court of Appeals erred in rejecting Petitioners' assertion that the regulation is a legitimate time, place and manner restriction. Initially, the Court of Appeals erred in implying that a time, place and manner restriction cannot ban a particular form of expression. *Barnes, supra*, involves just such an unqualified ban on nude public dancing and was upheld by this Court. Secondly, the Court of Appeals' rejection of the Board's position because the regulation is a "speaker specific, unqualified ban on a category of expressive activity" and thus, is *per se* objectionable, is simply incorrect. The regulation is not addressed to commercial speech itself, but rather upon a particular *manner* of expressing that speech. The appropriate inquiry, therefore, is whether or not the State has advanced non-content based reasons for banning the particular mode of solicitation prohibited by the rule in question.

[23] *City of Renton, supra*, at 475 U.S. 51-52, 106 S.Ct. 931, 89 L.Ed.2d 40, requires that the body enacting a regulation have a reasonable basis to believe that the harm to be protected against actually exists. It is not required that new studies be embarked upon or evidence be produced independently as long as the evidence relied upon is reasonably relevant to the problem addressed. The State here need look only to the findings of this Court in *Ohralik* and the results of the "Survey" conducted by the AICPA to justify enactment of the regulation at issue herein.

[24] In *Metromedia, supra*, at 453 U.S. 515-16, 101 S.Ct. 2897, 69 L.Ed.2d 819-20, the plurality rejected a theory that the regulation affecting certain billboard advertising could be characterized as a time, place and manner restriction in its prohibition of noncommercial billboards. The Court stated that "the ordinance does not generally ban billboard advertising as an
(continued...)

See Zauderer v. Office of Disciplinary Counsel, supra, at 471 U.S. 641-42, 105 S.Ct. 2277, 85 L.Ed.2d 666 (1985) (O'Connor, J., dissenting). As was noted by Judge Edmondson in his dissent below, *Fane v. Edenfield, supra*, 945 F.2d at 1520, the sales pitches offered by attorneys when engaged in direct, in-person solicitation are clearly analogous to those which could be offered by CPAs. In both contexts, a highly trained professional has the ability to overwhelm the unwary and unlearned consumer.

This is especially true when CPAs, such as Fane, are primarily concerned with a tax practice. It would hardly be a shock to this Court to note, given the complexities of the various state and federal income tax rules, statutes and regulations, that a CPA trained in their application may well be in a similar position to that of an attorney "ambulance chasing" to find a potential personal injury client. In both circumstances the potential client is likely to be at his or her wit's end and ready to listen to any voice of approval or perceived authority. The Department of the Treasury recognized these possibilities for vexatious conduct in rejecting any amendment to its rule prohibiting in-person solicitation by practitioners before the Internal Revenue Service after *Ohralik, supra*, was decided. *See* 44 Fed. Reg. 4, 940-41 (1979).

Cold calls are unlike advertisements, which can be

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[22](...continued)
unacceptable manner of communicating information or ideas; rather, it permits various kinds of signs. Signs that are banned are banned everywhere and at all times." As to the instant rule, direct, in-person uninvited commercial solicitation by CPAs is "banned everywhere and at all times" and therefore does not distinguish between permissible and impermissible commercial solicitation based on content.

effectively reviewed and monitored through means less onerous than an absolute prohibition. In *Bates, supra*, this Court found an outright ban on all lawyer advertisements to be unconstitutional, given the less onerous means reasonably available to review written or electronic expressions of commercial speech. The Court noted a state's asserted desire to ban all lawyer advertising implicated *control* of the speech itself rather than the protecting of the public from overbearing lawyers seeking work. In *Ohralik*, however, as in the instant case, the state's concern was based upon the *mode* of communication, not the communication itself.[23] The inability to ascertain what may have been said during an uninvited telephone contact results in a vitiation of the state's ability to police fraudulent, coercive, or in the case of audit engagements, collusive acts of soliciting CPAs. Such a specter of helplessness on the part of the licensing authority, when confronted with issues that go to the core of the accounting profession's integrity and objectivity, can only result in the diminution of the profession's standing in the eyes of the public and a lessening of ethical standards. Banning the *manner* of solicitation is justified here where the State has no reasonable ability of reviewing the content of such regulation.

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[23] *Metromedia, supra*, states at 453 U.S. 501, 101 S.Ct. 2889, 69 L.Ed.2d 810-11:

> Even a cursory reading . . . reveals that at times First Amendment values must yield to other societal interests. These cases support the cogency of Justice Jackson's remark in *Kovacs v. Cooper*, 336 U.S. 77, 97, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949): Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method. [Footnote omitted.]

In *Ohralik, supra*, at 436 U.S. 457, 98 S.Ct. 1919, 56 L.Ed. 2d 454, the Court permitted the state to ban just such direct, in-person, uninvited solicitations as those at issue here, when practiced by attorneys, because of the special dangers presented by such a mode of commercial communication. The Court did not subject the regulation in question to the heightened scrutiny required for content-based prohibitions. Instead, the Court held that the regulation prohibiting direct, in-person solicitation required less scrutiny than a content-based regulation:

> In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia State Board of Pharmacy*, it lowers the level of appropriate judicial scrutiny.

Ohralik, supra, at 436 U.S. 457, 98 S.Ct. 1919-20, 56 L.Ed. 454.

Indeed, it is difficult to analyze *Bates, supra*, and *Ohralik, supra*, other than by ascertaining that the Court determined that the distinction in the *mode of communication* at issue in the two cases was the deciding factor.[35] In *Bates*, the State unconstitutionally sought to ban lawyer solicitation of potential clients through the various print and electronic advertising media. In *Ohralik*, the State simply banned direct, in-person solicitation of potential

[35] "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." *Shapero, supra*, at 486 U.S. 475, 108 S.Ct. 1922, 100 L.Ed.2d 485.

clients.[36] Both forms of solicitation were aimed at seeking prospective clients, and both sets of regulations banned that activity. When the states are involved in regulating learned professions, a rule can be accepted as a valid time, place and manner restriction if the justification for the restriction deals with the maintenance of "true professionalism" coupled with the impossibility of meaningful regulation by any other means. Such circumstances justify a prophylactic ban on certain modes of expression as long as ample alternative methods of communication remain open. *See Barnes, supra*, at __ U.S. __, 111 S.Ct. 2461-63, 115 L.Ed.2d 512, 514; *Metromedia, supra*, at 453 U.S. 508-09, 101 S.Ct. 2892-93, 69 L.Ed.2d 815; *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).

As the final prong of the O'Brien test requires, there is no question that alternative channels of communication remain open under the Rule. The Rule prohibits only direct, in-person, uninvited solicitation. All other forms of solicitation or advertising by CPAs are permitted as long as they are not false, fraudulent, deceptive or misleading. *See* Rule 21A-24.001, F.A.C., and Section 473.323(1)(f), Fla. Stat. Indeed in *Ohralik, supra*, and *Shapero, supra*, the Court recognized the legitimacy of prohibiting direct, in-person, uninvited solicitation of potential clients for remuneration, as long as other forms of communication remain open.

The State's Rule prohibiting direct, in-person, uninvited

[36] The Court recognized in the *Ohralik* companion case of *In re Primus, supra*, that direct solicitation of non-remunerative clients was essentially noncommercial speech and the public interest could not justify a prophylactic ban where the impact on the state's interest in maintaining professional standards was much less persuasive.

solicitation passes constitutional muster. Whether the Rule is justified because of the secondary effects of such unchecked solicitation upon the State's regulatory scheme for the public accountancy profession,[37] or as a reasonable regulation based upon traditional State authority in regulating learned professions,[38] or as a compelling State interest,[39] the Rule meets applicable First Amendment constraints and is a legitimate and necessary part of a general State scheme for the regulation of the public accountancy profession.

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[37] *See City of Renton, supra*, at 475 U.S. 50-51, 106 S.Ct. 925, 89 L.Ed.2d 29; *Barnes, supra*, at ___ U.S. ___, 111 S.Ct. 2468, 115 L.Ed.2d 521, (Souter, J., concurring).

[38] See *Barnes, supra*, at ___ U.S. ___, 111 S.Ct. 2463, 115 L.Ed.2d 515 (Scalia, J., concurring).

[39] *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).

CONCLUSION

For the foregoing reasons, the decisions of the Court of Appeals and the District Court should be reversed, and judgment should be entered in favor of Petitioners Fred H. Edenfield, et al., upholding the constitutionality of Petitioners' Rule prohibiting direct, in-person uninvited solicitation of potential clients by CPAs.

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NO. 91-1594

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

FRED H. EDENFIELD, et al., Petitioners,

v.

SCOTT FANE, Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

APPENDIX

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U.S. CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

14th Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA RULES OF APPELLATE PROCEDURE
(Fla. R. App. P.)

Rule 9.030 JURISDICTION OF COURTS

(a) Jurisdiction of Supreme Court.

(1) *Appeal Jurisdiction.*

(A) The Supreme Court shall review, by appeal:

(i) final orders of courts imposing sentences of death;

(ii) decisions of district courts of appeal declaring invalid a state statute or provision of the state constitution.

(B) When provided by general law, the Supreme Court shall review;

(i) by appeal final orders entered in proceedings for the

(ii) action of statewide agencies relating to rates or services of utilities providing electric, gas or telephone service

(2) *Discretionary Jurisdiction.*

(A) decisions of district courts of appeal that:

(i) expressly declare valid a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;

(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal;

(B) orders and judgments of trial courts certified by the district court of appeal in which

the appeal is pending to require immediate resolution by the Supreme Court, and:

(i) to be of great public importance, or

(ii) to have a great effect on the proper administration of justice;

CODE OF FEDERAL REGULATIONS
31 CFR Subtitle A (7-1-91 Edition)

§ 10.30 Solicitation.

(a) *Advertising and solicitation restrictions.* (1) No attorney, certified public accountant, enrolled agent, or other individual eligible to practice before the Internal Revenue Service shall, with respect to any Internal Revenue Service matter, in any way use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, unduly influencing, coercive or unfair statement or claim. For the purposes of this subsection, the prohibition includes, but is not limited to, statements pertaining to the quality of services rendered unless subject to factual verification, claims of specialized expertise not authorized by State or Federal agencies having jurisdiction over the practitioner, and statements or suggestions that the ingenuity and/or prior record of a representative rather than the merit of the matter are principal factors likely to determine the result of the matter.

(2) No attorney, certified public accountant, enrolled agent or other individual eligible to practice before the Internal Revenue Service shall make, directly or indirectly, an uninvited solicitation of employment, in matters related to the Internal Revenue Service. Solicitation includes, but is not limited to, in-person contacts, telephone communications, and personal mailings directed to the specific circumstances unique to the recipient. This restriction does not apply to: (i) Seeking new business

from an existing or former client in a related matter; (ii) solicitation by mailings, the contents of which are designed for the general public; or (iii) non-coercive in-person solicitation by those eligible to practice before the Internal Revenue Service while acting as an employee, member, or officer of an exempt organization listed in sections 501(c)(3) or (4) of the Internal Revenue Code of 1954 (26 U.S.C.).

(b) *Permissible advertising.* (1) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service, may publish, broadcast, or use in a dignified manner through any means of communication set forth in paragraph (d) of this section:

(i) The name, address, telephone number, and office hours of the practitioner or firm.

(ii) The names of individuals associated with the firm.

(iii) A factual description of the services offered.

(iv) Acceptable credit cards and other credit arrangements.

(v) Foreign language ability.

(vi) Membership in pertinent, professional organizations.

(vii) Pertinent professional licenses.

(viii) A statement that an individual's or firm's practice is limited to certain areas.

(ix) In the case of an enrolled agent, the phrase "enrolled to represent taxpayers before the Internal Revenue Service" or "enrolled to practice before the Internal Revenue Service."

(x) Other facts relevant to the selection of a practitioner in matters related to the Internal Revenue Service which are not prohibited by these regulations.

(2) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service may use, to the extent they are consistent with the regulations in this section, customary biographical insertions in approved law lists and reputable professional journals and directories, as well as professional cards, letterheads and announcements: Provided, That: (i) Attorneys do not violate applicable standards of ethical conduct adopted by the American Bar Association, (ii) certified public accountants do not violate applicable standards of ethical conduct adopted by the American Institute of Certified Public Accountants, and (iii) enrolled agents do not violate applicable standards of ethical conduct adopted by either the National Society of Public Accountants or the National Association of Enrolled Agents.

(c) *Fee information.* (1) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service may disseminate the following fee information:

(i) Fixed fees for specific routine services.

(ii) Hourly rates.

(iii) Range of fees for particular services.

(iv) Fee charged for an initial consultation.

(2) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service may also publish the availability of a written schedule of fees.

(3) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service shall be bound to charge the hourly rate, the fixed fee for specific routine services, the range of fees for particular services, or the fee for an initial consultation published for a reasonable period of time, but no less than thirty days from the last publication of such hourly rate or fees.

(d) *Communications.* Communications, including fee information, shall be limited to professional lists, telephone directories, print media, permissible mailings as provided in these regulations, radio and television. In the case of radio and television broadcasting, the broadcast shall be pre-recorded and the practitioner shall retain a recording of the actual audio transmission.

(e) *Improper association.* An attorney, certified public accountant or enrolled agent may, in matters related to the Internal Revenue Service, employ or accept employment or assistance as an associate, correspondent, or sub-agent from, or share fees with, any person or entity who, to the knowledge of the practitioner, obtains clients or otherwise practices in a manner forbidden under this section: Provided, That a practitioner does not, directly or indirectly, act or hold himself out as an Internal Revenue Service practitioner in connection with that relationship. Nothing herein shall prohibit an attorney, certified public accountant, or enrolled agent from practice before the Internal Revenue Service in a capacity other than that described above.

[44 FR 4943, Jan. 24, 1979]

FLORIDA STATUTES (Fla. Stat.)

473.301 Purpose.--The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

473.319 Contingent fees.--Public accounting services shall not be offered or rendered for a fee contingent upon the findings or results of such service. This section does not apply to services involving federal, state, or other taxes in which the findings are those of the tax authorities and not those of the licensee. Fees to be fixed by courts or other public authorities, which are of an indeterminate amount at the time a public accounting service is undertaken, shall not be regarded as contingent fees for purposes of this section.

473.3205 Commissions.--A licensee who is engaged in the practice of public accounting shall not pay a commission to obtain a client, nor shall he accept compensation for the sale of products, other than the work product of the licensee, or for referral of products or services of others. However, this section shall not prohibit:

(1) Payments for the purchase of an accounting practice;

(2) Retirement payments to individuals formerly engaged in the practice of public accounting or payments to their heirs or estates; or

(3) Payment of fees to a referring licensee for public accounting services to either the successor licensee or the client in connection with an engagement.

473.322 Prohibitions; penalties.–

(1) No person shall knowingly:

(a) Practice public accounting unless the person is a certified public accountant or a public accountant;

(b) Assume or use the titles or designations "certified public accountant" or "public accountant" or the abbreviation "C.P.A." or any other title, designation, words, letters, abbreviations, sign, card, or device tending to indicate that such person holds an active license under this act, unless such person holds an active license under this act;

(c) Attest as an expert in accountancy to the reliability or fairness of presentation of financial information or utilize any form of disclaimer of opinion which is intended or conventionally understood to convey an assurance of reliability as to matters not specifically disclaimed unless such person holds an active license under this act. This subsection shall not prevent the performance by persons other than certified public accountants of other services involving the use of accounting skills. including the preparation of tax returns and the preparation of financial statements without expression of opinion thereon.

(d) Present as his own the license of another;

(e) Give false or forged evidence to the board or a member thereof for the purpose of obtaining a license;

(f) Use or attempt to use a public accounting license which has been suspended, revoked, or placed on inactive status;

(g) Employ unlicensed persons to practice public accounting; or

(h) Conceal information relative to violations of this act.

(2) Any person who violates any provision of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

473.323 Disciplinary proceedings.–

(1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:

(a) Violation of any provision of s. 473.317, s. 455.227(1), or any other provision of this act;

(b) Attempting to procure a license to practice public accounting by bribery or fraudulent misrepresentations;

(c) Having a license to practice public accounting revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of another state, territory, or country;

(d) Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of public accounting or the ability to practice public accounting;

(e) Making or filing a report or record which the licensee knows to be false, willfully failing to file a report or record required by state or federal law, willfully impeding or obstructing such filing, or inducing another person to impede or obstruct such filing. Such reports or records shall include only those which are signed in the capacity of a certified public accountant;

(f) Advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;

(g) Upon proof that the licensee is guilty of fraud or deceit, or of negligence, incompetency, or misconduct, in the practice of public accounting;

(h) Violation of any rule adopted pursuant to this act or chapter 455;

(i) Practicing on a revoked, suspended, or inactive license;

(j) Suspension or revocation of the right to practice before any state or federal agency;

(k) Performance of any fraudulent act while holding a license to practice public accounting; or

(l) Engaging in direct, in person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the board.

(m) The failure by the licensee to maintain the good moral character requirement provided in s. 473.306.

(2) The board shall specify, by rule, what acts or omissions constitute a violation of subsection (1).

(3) When the board finds any licensee guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

(a) Denial of an application for licensure.

(b) Revocation or suspension of a license.

(c) Imposition of an administrative fine not to exceed $5,000 for each count or separate offense.

(d) Issuance of a reprimand.

(e) Placement of the licensee on probation for a period of time and subject to such conditions as the board may specify, including requiring the licensee to attend continuing education courses or to work under the supervision of another licensee.

(f) Restriction of the authorized scope of practice by the certified public accountant,

(4) The department shall reissue the license of a disciplined licensee upon certification by the board that the disciplined licensee has complied with all of the terms and conditions set forth in the final order.

FLORIDA ADMINISTRATIVE CODE (F.A.C.)

21A-21.001 Independence.

(1) A licensee shall not express an opinion on financial statements of an enterprise or on the reliability of an assertion by one party for use by another (third) party unless he and his firm are independent with respect to such enterprise or the party making the assertion. Independence will be considered to be impaired if, for example:

(a) During the period of his engagement, or at the time of expressing his opinion, he or his firm:

1. Had or was committed to acquire any direct financial interest or material indirect financial interest in the enterprise; or

2. Had any joint closely held business investment with the enterprise or any officer, director or principal stockholder thereof which was material in relation to his or his firm's net worth; or

3. Had any loan to or from the enterprise or any officer, director or principal stockholder thereof. The latter proscription does not apply to the following loans from a financial institution when made under normal lending procedures, terms and requirements:

a. Loans obtained by a certified public accountant or his firm which are not material in relation to the net worth of such borrower.

b. Home mortgages.

c. Other secured loans, except loans guaranteed by a certified public accountant's firm which are otherwise unsecured.

(b) During the period covered by the financial statements, during the period of the engagement, or at the time of expressing an opinion, he or his firm:

1. Was connected with the enterprise as a promoter, underwriter or voting trustee, a director or officer or in any capacity equivalent to that of a member of management or of an employee; or

2. Was a trustee of any trust or executor or administrator of any estate if such trust or estate had a direct or material indirect financial interest in the enterprise; or was a trustee for any pension or profit-sharing trust of the enterprise.

(c) The above examples are not intended to be all inclusive.

21A-24.001 Advertising.

(1) No licensee shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive, or misleading, if it, among other things:

(a) Contains a misrepresentation of facts; or

(b) Makes only a partial disclosure of relevant facts; or

(c) Creates false or unjustified expectations of beneficial assistance; or

(d) Appeals primarily to a layperson's fears, ignorance, or anxieties regarding his state of financial well-being; or

(e) Contains any representation or claims, as to which the licensee, referred to in the advertising, does not expect to perform; or

(f) Contains any other representation, statement, or claim which misleads or deceives; or

(g) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accountancy unless he has in fact received such recognition and such recognizing agency is approved by the Board. In the event a licensee uses the term "specialty" or "specialist" or any other term tending to indicate that he specializes in any aspect of the practice of public accountancy the advertisement must state that the use of the term is a self-designation and is not sanctioned by the state or federal government in any advertisement or offering to the public unless such terms and recognition have been approved by the Board. However, a licensee may indicate the services offered and may state that practice is limited to one or more types of services when this is in fact the case; or

(h) Represents that professional services can or will be competently performed for a stated fee when this is not the case, or makes representations with respect to fees for professional services that do not disclose all variables affecting the fees that will in fact be charged; or

(i) States a form of recognition by any entity other than the Board that uses the terms "certified," "public," or "auditor," or "auditing" however, this would not prohibit a licensee from disclosing that he is a CPA in another state or jurisdiction; or

(j) States or implies that the licensee has received formal recognition as a specialist in any aspect of the practice of public accounting, unless the statement contains a disclaimer stating that the recognizing agency is not affiliated with or sanctioned by the state or federal government. The advertisement must also contain the agency's requirements for recognition, including, but not limited to, educational, experience and testing. These statements must be in the immediate proximity of the statement that implies formal recognition as a specialist.

(2) As used in the rules of the Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or indirectly, of selling public accounting services, or offering to perform public accounting services, or inducing members of the public to enter into any obligation relating to such public accounting services. For purposes of this rule, oral or written statements include business cards and letterhead. *Specific Authority 473.304, 473.323, F.S. Law Implemented 473.323 F.S. History--New 12-4-79, Amended 2-3-81, 12-29-83, Formerly 21A-24.01, Amended 5-20-91.*

21A-24.002 Solicitation.

(1) A licensee may respond to any request for a proposal to provide public accounting services and may provide such services to those requesting same.

(2) A licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services: (a) if the communication would violate Rule 21 A-24.001 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication.

(3) For purposes of this rule, the term "direct, in-person, uninvited solicitation" shall be deemed and construed to mean any communication which directly or implicitly requests an immediate oral response from the recipient. Uninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited. Indirect forms of solicitation such as giving speeches, conducting educational seminars, distributing professional literature by mail or other forms of delivery that are not "in-person", writing books and articles, etc., are permitted.

(4) Any form of written communication to a potential client, invited or not, is permissible under this rule provided such communication conforms to the advertising guidelines of Rule 21 A-24.001. *Specific Authority 473.304, 473.323 F.S. Law Implemented 473.323 F.S. History--New 12-4-79, Amended 2-3-81, Formerly 21A-24.02.*

TEXAS STATUTES

Tex. Rev. Civ. Stat. Ann. Art. 41A-1,
Section 6(a)(2) (1991)

Rulemaking

Sec.6.(a) The board shall adopt rules deemed necessary or advisable to effectuate this Act, including the adoption of rules of professional conduct in order to establish and maintain high standards of competence and integrity in the practice of public accountancy and to ensure that the conduct and competitive practices of licensees serve the purposes of this Act and the best interest of the public. The board in its rules of professional conduct shall not restrict advertising or competitive bidding by licensees except if necessary to:

(2) Ensure that the conduct and dealings of licensees are free from fraud, undue influence, deception, intimidation, overreaching, harassment, and other forms of vexatious conduct, including uninvited solicitations to perform professional accounting services; provided, however, that the term "uninvited solicitations"

shall not be deemed to include advertising using mass media; or
....

GEORGIA STATUTES

Ga. Code Ann., Section 43-3-35(i) (1988)

(i) The board may by rule or regulation prohibit a licensee from soliciting by any direct personal communication an engagement to perform professional services. (Ga. L. 1908, p.86 § 1; Penal Code 1910, § 702; Code 1933, § 84-9902; Code 1933, § 84-213, enacted by Ga. L. 1935, p.85. § 13; Ga. L. 1943, p.363, § 5; Ga. L. 1968, p.1232, § 2; Code 1933, § 84-215, enacted by Ga. L. 1977, p.1063, § 1; Ga. L. 1983, p.559. § 15.)

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QUESTIONS PRESENTED

1. May a state, consistent with the First Amendment, impose a categorical ban forbidding certified public accountants from engaging in any direct, oral, uninvited solicitation of prospective clients?

2. Is Florida's categorical ban on any direct, oral, uninvited solicitation by CPAs a content-neutral "time, place, and manner" restriction subject to less exacting scrutiny than an outright ban on commercial speech?

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In The

Supreme Court of the United States

October Term, 1992

No. 91-1594

FRED H. EDENFIELD, *et al.*,

Petitioners,

v.

SCOTT FANE,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Eleventh Circuit

BRIEF OF RESPONDENT

Introduction

This action was brought by respondent Scott Fane, a Florida certified public accountant ("CPA"), to challenge the constitutionality of a regulation adopted by petitioners, the members of the Florida Board of Accountancy ("Board"), that prohibits CPAs from engaging in any oral solicitation of new clients, whether face-to-face or by telephone. The district court granted Fane summary judgment, finding that the regulation did not further the asserted governmental interest of preventing collusion between businesses and CPAs when the CPA attests to the accuracy of audits or financial statements. The court of appeals affirmed for similar reasons.

This Court should affirm as well. Settled First Amendment doctrine requires the Board to establish that the regulation directly furthers a substantial state interest and is narrowly drawn. The fatal flaw in the Board's case is the lack of any nexus between the prohibition and the State's asserted interests. There is no evidence whatsoever -- empirical, anecdotal, or otherwise -- that CPAs who engage in oral solicitation are more likely to commit fraud by falsely attesting to financial statements than other CPAs. Nor is there any evidence that CPAs engage in the sort of abusive solicitation practices that led this Court to uphold a solicitation ban for lawyers in *Ohralik v. Ohio State Bar Association*. To the contrary, the extensive experience in the 47 states that permit oral solicitation by CPAs shows that there is no reason to believe that oral solicitation facilitates any kind of improper activity.

Equally hollow is the Board's argument that the regulation be given less searching scrutiny as a time, place, and manner restriction. The ban does far more than regulate the details of when, where, and how oral solicitation may take place. It outlaws an entire category of expressive activity: the oral solicitation of potential clients. Moreover, because the regulation can be justified only by reference to the content of the speech it suppresses, it is not content-neutral, and must therefore be subjected to the more exacting standards applicable to prohibitions on commercial speech, which it cannot meet. Finally, even if the ban is viewed as a time, place, and manner restriction, it is plainly unreasonable because it does not directly further an important state interest, and therefore cannot be sustained.

STATEMENT OF THE CASE

A. Background

Respondent Fane is a CPA licensed by the Florida State Board of Accountancy. Joint Appendix ("J.A.") at 9. Fane has an undergraduate degree in accounting from Rutgers, The State University of New Jersey, and a Masters Degree in Taxation from Georgia State University. *Id.* He has practiced as a CPA since 1981, with several years of accounting experience prior to becoming a CPA, and he has been employed by two national accounting firms. *Id.* at 10.

In July 1985, Fane moved from Haddonfield, New Jersey, to Homestead, Florida, where he wanted to build an accountancy practice. *Id.* However, he soon discovered a serious obstacle in his path: Florida is one of only three states that has erected a substantial barrier to competition among CPAs by prohibiting them from engaging in oral, uninvited solicitation of potential clients.[1]

Like other states, Florida comprehensively regulates the practice of accountancy through statutes and administrative rules, *see generally* Fla. Stat. Ann. §§ 473.301 *et seq.* (West 1991); Fla. Admin. Code §§ 21.A-24.001 *et seq.*, and Fane does not question Florida's power to supervise his profession. This case is narrowly focused on one provision of Florida law, providing that CPAs may be subject to disciplinary action, including license revocation, for "[e]ngaging in direct, in-person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the board." Fla. Stat. Ann. § 473.323(1)(*l*).

To implement this provision, the Board of Accountancy, which is composed of seven CPAs and two members of the public, issued a regulation providing that a CPA "shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication." Fla. Admin. Code § 21A.24.002(2)(c). The regulation further states that "any communication which directly or implicitly requests an immediate oral response from the recipient" constitutes an unlawful solicitation, and that "[u]ninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited."

[1] The other states are Texas and Louisiana. *See* Tex.Rev.Stat. art. 41a-1, § 6(a)(2)(Vernon's Supp. 1992) and Rules of Professional Conduct, Texas State Board of Public Accountancy, § 501.44 (Nov. 1989); and La.Rev.Stat. § 37.75(B), and 3 La.Admin.Code 46:XIX.507(D) (1988 Supp.). Georgia law authorizes its Board of Accountancy to restrict in-person solicitation, *see* O.C.G.A. § 43-3-35(i) (1988), but the Board repealed its ban on solicitation in January 1992, and its rules now permit in-person solicitation, so long as it is not misleading, deceptive, or coercive. I Rules and Regulations of the State of Georgia, Chapter 21-12-.15 (Feb. 1991 Supp.).

Id. (emphasis added). Accordingly, Fane is barred from visiting potential clients, from telephoning potential clients, and even from asking a potential client whom he happens to meet at a club or a social event if he or she is interested in discussing the services that Fane offers.

Florida's ban has seriously hampered Fane's ability to attract new clients. Fane is forbidden from undertaking the activities he needs to build his practice -- namely, contacting individuals who own or manage small to mid-size businesses in order to describe in full the services he offers and the prices he charges. J.A. at 11. If he could initiate such contacts, Fane could explain why his services are superior to those offered by other CPAs and accountants. Among other things, Fane would point out that he has eleven years of experience as a CPA, with training at two of the nation's most prestigious accounting firms; that he performs the work himself, unlike many competitors who use interns, trainees, or bookkeepers; that he is willing to tailor his services directly to his client's needs; and that he is exceptionally well qualified, having not only an accounting degree, but also a Masters Degree in Taxation and an appointment as an Adjunct Professor of Accounting at Miami Dade Community College. *Id.*

Florida's ban leaves Fane at a substantial competitive disadvantage for several reasons. First, the professionals against whom CPAs like Fane compete -- accountants, bookkeepers, tax preparers, and other financial experts -- are subject to neither the regulation challenged here, nor any other state-imposed restriction, and hence are free to engage in oral solicitation of prospective clients. Second, the ban seriously impedes Fane's ability to disseminate information about the services he offers. Broadcast advertising is prohibitively expensive. *Id.* Print advertising, which is permitted under Florida law, is no substitute for in-person contact both because the audiences are too diffuse, and because it does not allow for the full explanations and responses to questions that are so vital in informing a potential client about the services of a professional, such as a CPA. *Id.* Even direct, written solicitations suffer from many of the same limitations. *Id.*

B. District Court Proceedings.

Fane brought this action for declaratory and injunctive relief on August 17, 1988. In his motion for summary judgment, Fane challenged the Board's anti-solicitation regulation on the ground that it violates his First Amendment right to engage in commercial speech. Fane also argued that, by singling out CPAs -- but not other financial professionals against whom CPAs compete -- the ban discriminates against CPAs in violation of the Equal Protection Clause of the Fourteenth Amendment.

The sole defense offered by the Board was that the ban is needed to protect a CPA's integrity, independence, and objectivity in performing the "attest function" -- that is, the rendering of an independent opinion regarding a client's financial statements. Attestation permits those who use financial statements (*e.g.*, investors, lenders, and regulatory agencies) to rely on their accuracy. However, the Board submitted no evidence that oral solicitation has ever resulted in a false, fraudulent, or deceptive audit in Florida or in any of the 47 states where solicitation is permitted. Instead, the Board relied on the affidavit of Louis Dooner, a Florida CPA who had served as a member and Chairperson of the Florida Board of Accountancy and as a member of the Special Committee on Solicitation of the American Institute of Certified Public Accountants ("AICPA"). Mr. Dooner's affidavit simply asserted that "if a CPA has solicited the client he will be beholden to him" and that a CPA who solicits clients "is obviously in need of business and may be willing to bend the rules." J.A. at 19, 23. The Board also submitted the AICPA's *Report of the Special Committee on Solicitation*, but, as discussed more fully *infra* at 16-18, that report actually contradicts the Board's position because it concludes that there is no evidence to support a ban on solicitation.[2]

---

[2] The AICPA is "the most important private group affecting the practice of accounting. It dominates all significant aspects of accounting because the accounting profession is largely self-regulated, and Federal and State authorities have recognized policies and procedures established by the AICPA as representing the decisions of the accounting profession." *The Accounting Establishment*, A Staff Study of the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Operations, S. Doc. No. 95-34, 95th Cong., 1st Sess. 9 (March 31, 1977)("*The Accounting Establishment*"). Among other things, the AICPA issues a Code of Professional Ethics, which, for the public accounting profession, is the equivalent of the American Bar Association's Model Rules of Professional Conduct.

The Board did not argue that direct solicitation by CPAs was inherently misleading, or that potential clients needed to be protected from overreaching by CPAs. Indeed, the Board disavowed this argument. Mr. Dooner's affidavit flatly asserted that the ban "is not to protect the public from solicitors." J.A. at 20. Nor did the Board present any evidence, from Florida or elsewhere, that CPAs who engage in oral solicitation have engaged in overreaching or abusive conduct.

After hearing argument, the district court granted Fane summary judgment. The court's opinion began by observing that, according to the Board, "the primary objective" of the ban is "to prevent solicited clients from luring the CPA into a collusive relationship whereby a fraudulent attestation is issued." *Id.* at 80. The court then rejected the Board's argument that *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), supported the regulation's constitutionality, even though the Board argued that the ban is intended to protect third parties, not clients. The court reasoned that the factors that led this Court to uphold a ban on in-person solicitation by lawyers in *Ohralik* -- the possibility of undue influence and overreaching by the attorney and the absence of alternative regulatory controls -- were not present here. J.A. at 83. The court noted that, while lawyers are "trained to be coercive, persuasive . . . [and] to take particular advantage of face-to-face situations," CPAs are not, and thus the "dangers associated with in-person solicitation by uniquely trained attorneys simply are not present in the CPA context." *Id.* The court also observed that the "two groups of potential clients that are targeted for solicitation are in significantly different positions." *Id.* at 84. Attorneys "zero in on an 'unsophisticated, injured or distressed lay person,'" *id.* (*quoting Ohralik*, 436 U.S. at 465), whereas CPAs "prefer to solicit prosperous business people" who tend to be "knowledgeable about financial matters and successful enough to require specialized accounting services." *Id.* at 84-85. These differences, the court concluded, rendered *Ohralik* inapplicable. *Id.*

The court then turned to the Board's argument that the ban protects third parties. This assertion "posits that the client is using the CPA to deceive that client's business associates or members of the public." *Id.* at 85. Rejecting this argument, the

court reasoned that the "link between [the] regulation and forbidden activities seems quite tenuous, if at all existent." *Id.* at 86. The court concluded that "the defendant's implicit assumption that a client is more likely to approach an *un*known CPA about illegal activities is unfounded. The more logical assumption is that such a client would more likely approach a known CPA" with whom the client has had "a long-standing and mutually profitable relationship." *Id.* (emphasis in original).

Finally, the court rejected the Board's contention that a categorical ban was needed because of the difficulties in policing in-person solicitation. Unlike *Ohralik*, where the ban was imposed to prevent overreaching during face-to-face encounters between the attorney and the client, here the focus is on possible harm to third parties, which is easier to police. *Id.* Where CPAs are concerned, "proof regarding alleged misconduct is readily available" in the form of the audits or financial statements produced by the CPA, and the relevant facts "are objectively verifiable." *Id.* Accordingly, the court found that this rationale did not salvage the solicitation ban.

Based on its conclusion that the ban served no substantial state interest, the court entered summary judgment in Fane's favor and enjoined the Board from enforcing its regulation, but only as it applied to CPA solicitation "in the business context." *Id.* at 88. Having ruled on First Amendment grounds, the court did not reach Fane's equal protection claim. *Id.* at 79 n.3. The Board did not seek any stay of the district court's order, which has been in effect since September 13, 1990. Consequently, for the past two years, Fane and other Florida CPAs have engaged in solicitation "in the business context," without any reported untoward consequences.

C. The Court of Appeal's Ruling.

The Eleventh Circuit affirmed, with Judge Edmondson dissenting. Applying the analysis this Court has established for evaluating restraints on commercial speech, *see Board of Trustees v. Fox*, 492 U.S. 469 (1989), and *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the court first

assessed whether the solicitation ban furthered an important state interest. J.A. at 96-97. Rejecting the Board's argument that the ban was needed to "protect the public's ability to rely on the independence and objectivity of CPAs who are performing the attest function," *id.* at 96, the court stressed that "[n]owhere in the record . . . has [the Board] produced any evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation." *Id.* at 97.

The court also concluded that, even if there were a nexus between the ban and the asserted state interest, there were means far less draconian than a categorical ban that would achieve the state's goal equally well. *Id.* Although the ban was allegedly aimed at preserving the sanctity of the attest function, it applied to all work performed by CPAs, even though many CPAs, like Fane, never exercise the attest function because they do not render opinions on audits or financial statements. *Id.* The court also noted that a number of "[r]egulatory requirements exist in Florida that can be utilized to preserve the attest function . . . [and that the] Board does not offer any explanation as to why those requirements do not adequately afford the protection which it seeks." *Id.* at 98.[3]

The court next addressed the Board's contention -- raised for the first time on appeal -- that the regulation should be given minimal scrutiny as a content-neutral time, place, and manner restriction. The restraint cannot be so characterized, the court held, because it "acts as an unqualified ban on in-person solicitation rather than regulating the details of when, where, and how" such speech may take place. *Id.* at 99-100. The court also ruled that the ban is not content-neutral, but rather is a speaker-specific prohibition "on a category of expressive activity," *i.e.*, the direct,

[3] The court noted that Florida forbids a CPA from expressing an "opinion on the financial statements of an enterprise unless he and his firm are independent with respect to such enterprise," J.A. at 98 (*quoting* Fla. Stat. Ann. § 473.315(1)), and from engaging in fraudulent or deceptive conduct. *Id.* (*citing* Fla. Stat. Ann. § 473.323(1)(f)). The court also observed that CPAs who negligently or fraudulently attest to financial statements expose themselves to tort liability. *Id.*

in-person solicitation of potential clients, that is subject to more searching scrutiny. *Id.*

Finally, the court found that differences between CPAs and lawyers rendered the Board's reliance on *Ohralik* misplaced. The court emphasized that the "possibilities for overreaching, invasion of privacy, exercising undue influence, and outright fraud" that were rife in *Ohralik* "are remote in the accounting profession" because of the considerable differences in the training and clientele of lawyers and accountants. *Id.* at 102.

Judge Edmondson dissented, on the grounds that the "states are largely free to regulate the professionals which they license," and that *Ohralik* "is extremely persuasive and supports Florida's prohibition against in-person solicitation by CPAs." *Id.* at 103.

SUMMARY OF ARGUMENT

I.

Categorical restraints on commercial speech are strongly disfavored and may not be imposed merely because the state has unsubstantiated fears of isolated abuses. Such restraints may be sustained only if the state can affirmatively prove that the restraint directly furthers a substantial state interest and that it is narrowly tailored to that end. Florida's anti-solicitation regulation fails on both counts.

First, there is no evidence that the ban furthers any substantial state interest. Florida defends its ban by arguing that it protects CPAs from being lured into committing fraud by businesses in need of an undeserved clean financial opinion, and clients from being subjected to abusive solicitation practices by CPAs. However, there is not a shred of evidence to support the Board's claims. The available materials, including the only authoritative study uncovered by the parties, establish conclusively that there is no connection between in-person solicitation and wrongdoing by CPAs. What is more, Florida is virtually alone in imposing this restriction: 47 states and the District of Columbia

permit in-person solicitation by CPAs, and not a single federal regulatory agency that relies on audited financial statements, including the Securities and Exchange Commission, forbids in-person solicitation.

The lack of evidence to support Florida's ban is scarcely surprising given the inherent implausibility of the Board's theory. There is no reason to believe that a businessperson, looking to defraud associates or investors, would collude with a CPA who called out of the blue; nor is it likely that a CPA would be willing to risk his livelihood for a total stranger he happens to solicit. Yet the Board's position depends on both of these implausible assumptions. Nor is there merit to the Board's argument -- raised for the first time in this Court -- that CPA solicitation is fraught with the dangers to prospective clients identified by the Court in *Ohralik*. Not only is there no evidence that overreaching by soliciting CPAs has taken place, but the differences between lawyers and CPAs, and their respective clienteles, renders CPA misconduct of the sort the Board fears highly improbable.

Second, the ban is not narrowly tailored. Florida has in place a number of regulations which flatly prohibit -- and severely punish -- precisely the wrongdoing the Board seeks to prevent through the solicitation ban. CPAs who prepare fraudulent attestations or engage in deceptive conduct stand to lose their licenses, be subjected to fines and lawsuits, and go to jail. The Board has never explained why these direct and powerful deterrents are not sufficient. Moreover, the ban is far too sweeping, since it prohibits in-person solicitation for the wide array of non-attest function services performed by CPAs. Many CPAs, including Fane, rarely, if ever, exercise the attest function, yet they too are subject to a categorical ban applicable to all of their services. The Board has never explained why a ban limited to audit and attest functions would not serve its stated purpose equally well. Nor has the Board attempted to justify its sweeping prohibition on telephone solicitation. Whatever force the Board's concerns about face-to-face encounters may have, they evaporate when the prospective client need only hang up the telephone.

Lastly, the discrimination embodied in Florida's ban violates the Equal Protection Clause and demonstrates that the ban's real purpose is to stifle competition among CPAs, not to protect the public. Florida permits tax preparers, accountants, management advisory consultants, financial planners, and all other financial professionals against whom CPAs compete, to engage in oral solicitation without restriction, but it prohibits CPAs -- who are closely regulated by the state for competency and character and subject to the Board's disciplinary authority -- from engaging in solicitation even for non-attest related functions. By any measure, Florida's rule is irrational. If there were any justification for the solicitation ban apart from the attest function, it would surely apply with far greater force to non-CPAs, who are unregulated, than to highly regulated CPAs, yet only CPAs are forbidden from soliciting. Far from protecting the public, the ban on oral solicitation is one of the few remaining vestiges of earlier protectionist rules that sweepingly prohibited all forms of advertising, solicitation, and competitive behavior by CPAs -- rules which had to be abandoned because they clashed with the First Amendment. The same considerations that forced the elimination of those anti-competitive restraints compel affirmance of the judgment below.

II.

The Board's argument that its regulation should be judged under the time, place, and manner doctrine should also be rejected. The Board's last-ditch effort to characterize this regulation as a time, place, and manner restraint is in error, since the ban does not merely regulate when, where, or how CPAs may engage in direct, in-person, uninvited solicitation. Rather, it is a blanket, unqualified prohibition on an entire category of expression -- *i.e.*, the oral attempt to solicit potential clients. The Board's argument also misses the mark because the regulation, like all restraints on commercial speech, is clearly content-based. As such, the ban is subject to the standards this Court has articulated in the commercial speech context, which it cannot meet. At any rate, the ban cannot survive review under the time, place, and manner doctrine because it is a paradigm of an unreasonable, protectionist regulation. The Board has offered no evidence to establish that the ban furthers a substantial state interest. To the

extent that the Board claims to fear abusive solicitation practices by CPAs, the ban is irrational because it leaves all other financial professionals free to solicit without restraint. And, insofar as the Board seeks to defend the ban on attest function grounds, the ban is grossly overbroad, because it sweepingly prohibits solicitation for **any** work a CPA may perform. For these reasons, the ban cannot survive time, place, and manner scrutiny.

ARGUMENT

I. FLORIDA'S BAN VIOLATES THE FIRST AMENDMENT.

Introduction

This Court has repeatedly reaffirmed that commercial speech is entitled to substantial protection under the First Amendment. *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990); *Board of Trustees v. Fox*, 492 U.S. 469, 475 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976). This principle springs from the recognition that the dissemination of commercial information about the nature, availability, and price of goods and services is highly beneficial to consumers and society. *Virginia State Bd. of Pharmacy*, 425 U.S. at 763-65; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

To minimize the suppression of valuable commercial information, the First Amendment requires "the government's goals to be substantial, and the cost to be carefully calculated." *Fox*, 492 U.S. at 480. Blanket prohibitions on commercial speech are highly suspect. The mere opportunity "for isolated abuses and mistakes does not justify a total ban on that mode of protected commercial speech." *Shapero*, 486 U.S. at 476; *In re R.M.J.*, 455 U.S. 191, 203 (1982).

In *Central Hudson*, the Court laid down the now familiar four-part test for assessing the constitutionality of a restriction on commercial speech. That test inquires

> first, whether the speech concerns *"lawful activity"* and whether it is *"misleading"*;
>
> second, whether the government's purported interest in regulating speech is *"substantial"*;
>
> third, whether the legislation restricting speech *"directly advances the governmental interest asserted"*; and
>
> fourth, whether the legislation is *"no more extensive than necessary"* to serve the government's interest.

Central Hudson, 447 U.S. at 566 (emphasis added); *see also Shapero*, 486 U.S. at 472; *Zauderer*, 471 U.S. at 638. Measured against this test, the Florida ban cannot be sustained.

As to the first component of the *Central Hudson* test, there is no question that the speech at issue here, which relates solely to Fane's efforts to convince prospective clients that they ought to retain him, concerns lawful activity and is protected by the First Amendment. *See, e.g., Shapero*, 486 U.S. at 473-75; *Zauderer*, 471 U.S. at 638; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Indeed, the Board conceded this point below. *See, e.g.*, Brief of Appellants Edenfield, *et al.*, No. 90-3943, at 38 (11th Cir.).

With regard to the state interests purportedly served by the anti-solicitation regulation, the Board's Brief demonstrates only that the Board is still searching for a rationale to justify the ban. Until now, the Board has defended the ban **solely** on the ground that it is needed to protect those who rely on financial statements by preserving CPA independence in the audit and attest functions. *See, e.g.*, J.A. at 20; Pet. for Cert. at 10, 11 & n.10. In this Court, the Board apparently recognizes the weakness of that argument, and, for the first time, claims that the ban is also needed

to protect prospective **clients** by "prevent[ing] fraud, overreaching or misrepresentation" when CPAs solicit tax, financial planning, or management advisory engagements. Pet. Br. at 24.[4]

Fane does not dispute that preservation of a CPA's independence and integrity, especially when performing the attest function, is an important state goal, *cf. United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), as is prevention of fraud, overreaching, and misrepresentation. But as *Central Hudson* and the other commercial speech cases make clear, simply pointing to a substantial state interest is only the first step in the analysis -- the Board must also prove both that the ban "directly advances the governmental interest asserted," *Central Hudson*, 447 U.S. at 566, and that it is "narrowly tailored to meet the desired objective." *Fox*, 492 U.S. at 480. As we now demonstrate, the Board has failed to satisfy both parts of the test.

A. There Is No Connection Between Florida's Ban and the Asserted State Interests.

1. The Board Has Failed To Establish That The Ban Protects CPA Independence.

The first reason why the regulation cannot survive the *Central Hudson* test is that the Board has failed to demonstrate any connection between the state's interest in preserving the integrity of CPAs and its ban on solicitation. The Board's argument rests on the premise that in-person solicitation presents

[4] The Board's indecision in identifying the likely villain and victim when it comes to CPA solicitation casts doubt on whether there is any state interest served by the ban. On the one hand, the Board postulates that the client is the true malefactor, because a CPA who solicits is in need of clients and is likely to be enticed into committing fraud by a business seeking an unwarranted clean opinion on an audit or financial statement. On the other hand, the Board now asserts that the CPA is the one under suspicion, because some CPAs may engage in abusive solicitation practices that will be injurious to potential clients. The Board makes these inconsistent arguments, even though it is obvious that a ban on oral solicitation cannot both guard against overreaching by clients and against overreaching by CPAs at the expense of those same clients.

a unique problem of fraud and abuse, posed by no other aspect of the CPA-client relationship or any other form of advertising and solicitation, because it somehow encourages CPAs to cast aside their professional responsibilities and to agree to participate in fraud. This premise necessarily relies on the following related assumptions: (a) businesses interested in obtaining an undeserved "clean opinion" on their financial statements are more likely to importune a CPA that they do not know, who contacts them out of the blue in-person or over the telephone, than a CPA with whom they have had prior dealings, or an unfamiliar CPA who contacts them through some written form of solicitation; and (b) CPAs who engage in oral solicitation are more likely to compromise their independence and integrity than all other CPAs, including those who engage in written solicitation.

These assumptions are transparently implausible. The Board's argument postulates that oral solicitation between a CPA and a potential client is a breeding ground for corruption. But, if anything, familiarity with, and financial dependence on, a regular client doubtless increase the likelihood that a CPA would be willing to compromise his or her professional judgment for the sake of that client. It is far more plausible that a CPA could be persuaded to shade the truth for a long-term client, on whose business the CPA relies financially, than for a total stranger. It is also far more plausible that a businessperson looking for a CPA with whom to collude in committing fraud would approach a CPA with whom he or she had prior dealings, and with whom communications are privileged, *see* Fla. Stat. Ann. § 473.316, than sit idly by, waiting to be solicited by an unfamiliar CPA, who might be more inclined to report the businessperson to the authorities and who would not be bound by the client-CPA privilege. *Id.* § .316(4)(a).

Not only does the Board's position defy common sense, but the Board has failed to come forward with any evidence showing that in-person solicitation jeopardizes the independence that CPAs are required to exercise in their attest function, despite the fact that it is the Board that bears the burden of proof. *See Fox*, 492 U.S. at 480. Indeed, the Board's position is actually undermined by the two sources on which the Board relies.

The first is the affidavit of Louis W. Dooner, which fails to demonstrate any link between in-person solicitation and dishonest conduct. Mr. Dooner simply asserts, without citation to facts or empirical evidence, that if the CPA "has solicited the client he will be beholden to him," and, therefore, the CPA "may be willing to bend the rules." J.A. at 19, 23. Nowhere does Mr. Dooner explain why a CPA who has solicited a client is any **more** beholden to that client than a CPA whose long-term association with a client has made him financially reliant on the client. Nor does Mr. Dooner explain why a CPA who solicits orally would be **more** willing to bend the rules than other CPAs, including those who solicit through other means.

Mr. Dooner also contends that a CPA who engages in oral solicitation may be less ethical than other CPAs because "the CPA is obviously in need of business." J.A. at 23. This contention overlooks the fact that all professional firms -- including CPA and law firms -- are constantly seeking new business to retain and expand their existing practices. The mere fact that a professional is seeking new business provides no foundation for Mr. Dooner's assumption that he or she would "be willing to bend the rules" to acquire new clients. Indeed, CPAs who engage in permissible forms of advertising and solicitation are also "obviously in need of business," yet Mr. Dooner does not accuse them of being willing to engage in wrongful conduct.

The Board's second submission is the *Report of the Special Committee on Solicitation* of the AICPA ("Report on Solicitation"), which is discussed in its Brief to this Court only in a footnote. *See* Pet. Br. at 31 n.27. The Report is the only rigorous analysis of the solicitation issue uncovered by either party, and, as noted above, *see* n.2 *supra*, the AICPA is the dominant standard-setting organization for CPAs. To understand the significance of the Report, it is necessary to know why it was prepared.

The AICPA has historically played the lead role in formulating ethics codes to guide the conduct of CPAs. In fact, the regulation of the public accounting profession in the United States dates back to 1917, when the American Association of

Public Accountants, now the AICPA, promulgated its first Code of Professional Ethics. J.A. at 43. Rule 8 of that Code provided that "[n]o member shall directly or indirectly solicit nor encroach upon the business of another member . . . ." *Id.* In 1948, the AICPA broadened the Rule to apply the ban on solicitation and encroachment to all prospective clients. *Id.* Plainly, neither version of the Rule was aimed at preserving the independence of CPAs in the attest function or protecting the public; both were designed to limit competition among CPAs.

Following this Court's ruling in *Bates v. Arizona State Bar*, *supra*, the Rule was amended in early 1979 to provide that "[a] member shall not seek to obtain clients in a manner that is false, misleading, or deceptive. A direct uninvited solicitation of a specific potential client is prohibited." *Id.* at 45. The Justice Department, which had expressed concern over the anti-competitive impact of AICPA's ethics rules as early as 1973, *id.*, threatened suit over the solicitation ban in the amended rule. *Id.* at 34, 45. To avoid litigation, which the AICPA believed it would lose because of the lack of evidence showing that in-person solicitation would compromise CPA independence or lead to abusive conduct by CPAs, *id.* at 45-46, the AICPA membership voted overwhelmingly to eliminate the solicitation ban. *Id.* at 46.

At the same time, the AICPA decided to study the solicitation question further, and, to that end, created a Special Committee on Solicitation, which issued its Report on Solicitation in 1981. *Id.* at 29. At the outset, the Report recommended that the "AICPA Code of Professional Ethics should not contain a general prohibition of direct uninvited solicitation of potential clients . . . ." *Id.* at 34. In explaining this recommendation, the Report emphasized "the absence of persuasive evidence that direct uninvited solicitation is likely to lead to false or misleading claims or oppressive conduct makes it unlikely that the ban would be upheld in a judicial proceeding." *Id.* at 35. The same reasoning led the Committee to reject the idea that the AICPA should seek to influence state legislatures to adopt stringent anti-solicitation laws. The Report stated "that such bans, if enacted by legislatures, would probably not survive constitutional challenge if applied to nondeceptive, noncoercive instances of solicitation." *Id.* at 41.

The Report next rejected the contention that a ban is needed to preserve independence in the attest function, finding that there is no evidence to support such theory, and that, "[e]ven if such data were available, the committee's legal counsel advises that it would not justify a total prohibition of direct uninvited solicitation, oral or written, but only a narrow ban on solicitation of audit and review engagements." *Id.* at 38 & n.4. On the question of whether such a narrower ban should be imposed, the legal opinion on which the Committee relied observed that the "AICPA would have to prove that such conduct is likely to impair the independence of accountants in fact or is likely to be perceived as so doing by users of financial statements; we are presently unaware of any empirical data which would sustain this burden." *Id.* at 74-75. The Report concluded by stating that "[w]e are unaware of the existence of any empirical data supporting the theor[y] that CPAs . . . are not independent of clients obtained by direct uninvited solicitation . . .." *Id.* at 38-39. Thus, the primary source submitted by the Board actually **refutes** its arguments to this Court.[5]

The Board's claim that in-person solicitation threatens CPA independence is also at odds with the commentary on the CPA profession. None of the sources that respondent has identified even mentions oral solicitation as a threat to independence. Rather, the commentators agree that the more enmeshed the CPA becomes in the affairs of the client, and the more the CPA depends financially on the client, the greater is the threat to the CPA's independence. The most serious threat to independence is posed when an existing auditor becomes involved in providing

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[5] The Report also noted that "a preponderance of the AICPA membership believes that direct uninvited solicitation to acquire clients does not impinge on the independence of CPAs. The survey disclosed that 11 percent were in 'total agreement' with the proposition that impairment occurred, whereas 34 percent were in 'total disagreement.'" J.A. at 39. The description of the survey results in the Board's brief is not entirely accurate. While the Board argues that "[n]early two-thirds of the CPAs responding to the 'Survey' had grave difficulties with uninvited solicitation in any form," Brief at 32 n.27, the Board neglects to mention that the survey also reported that a "substantial majority" of members disagreed with the statements that "solicitation impairs the independence of CPAs," and "solicitation impairs the quality of services CPAs render." J.A. at 58; *see also id.* at 49 (summarizing survey's findings). Moreover, the Board overlooks the fact that, among the reasons why members have "negative attitudes" towards in-person

(continued...)

the client with non-audit related management advisory services --such as executive recruitment, actuarial services, identification of merger and acquisition candidates, and valuation of assets. These activities are an important source of revenue for accounting firms, and the provision of these services renders the CPA more vulnerable to the client's demands.[6]

The other significant threat to CPA independence is "opinion shopping," *i.e.*, where the client "actively seeks an accountant who will support a proposed accounting treatment to accomplish the company's reporting objectives, regardless of whether that treatment is acceptable" under generally accepted accounting principles. GAO Report at 37. *See also* Daniel L. Goelzer, *The SEC and Opinion Shopping: A Case Study in the Changing Regulation of the Accounting Profession*, 52 Brook. L. Rev. 1057 (1987). Of course, the in-person solicitation ban addresses neither of these problems; impairment of independence resulting from fear of losing lucrative non-audit business arises only where there is a pre-existing relationship between CPA and client, and "opinion shopping" takes place only when the **client** engages in solicitation of CPAs, not the reverse.

The Board cannot excuse its failure to support its position with evidence on the ground that the ban makes it impossible to gather proof of wrongdoing. As mentioned above, only two other states, Louisiana and Texas, ban in-person solicitation. Every other state and the District of Columbia -- whose residents and

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[5] (...continued)
solicitation are their fears that solicitation "will tend to lower CPA fees," and "increase both litigation and government regulation of the profession," *id.* at 58, considerations not relied on by the Board.

[6] *See, e.g., The Accounting Establishment, supra*, at 34, 50-52; William Sternberg, *Cooked Books: Practices of Large Accounting Firms Contributed to Financial Scandals*, Vol. 269, No. 1, The Atlantic, 20 (Jan. 1992); GAO, *CPA Audit Quality: Status of Actions Taken to Improve Auditing and Financial Reporting of Public Companies*, 35 (Mar. 1989)(GAO/AFMD-89-38)(hereinafter "GAO Report"); Note, *The Big Eight, Management Consulting and Independence: Myth or Reality?*, 61 S. Cal. L. Rev. 1511 (1988); Note, *Failure to Maintain Independence: A Proposed Cause of Action Against Accountants*, 62 Tex. L. Rev. 923 (1984); Abraham J. Briloff, *The Accounting Profession Behind the Eight Ball*, 61 Tex. L. Rev. 1357 (1983).

businesses depend just as heavily on the accuracy of financial statements and audits as do Florida's -- permit in-person solicitation and have done so for years. J.A. at 46-48. Despite this wealth of experience with in-person solicitation, the Board has not presented evidence **of a single instance**, in Florida or elsewhere, in which solicitation led to any of the improprieties the Board says it fears.

Similarly, many federal regulatory agencies depend on the accuracy of audited financial reports, both to determine the soundness of commercial institutions they regulate (like banks and savings and loans) and to ensure that the government and investors are not being defrauded. For example, publicly held corporations must periodically submit audited financial statements to the Securities and Exchange Commission ("SEC"). Despite the fact that the SEC closely regulates auditors to ensure their independence, the SEC has never suggested that in-person solicitation jeopardizes the independence of CPAs.[7] Nor have any of the other regulatory agencies that use audited statements to monitor commercial entities, such as the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Office of Thrift Supervision, and the Commodity Futures Trading Commission, imposed restraints on solicitation by CPAs.[8]

The Internal Revenue Service ("IRS") regulation relied on by the Board is not to the contrary. The Board asserts that the IRS "realize[s] the problems associated with direct, in-person, uninvited solicitation by CPAs, and ha[s] found such solicitation to be inappropriate." Pet. Br. at 29-30. The Board's implication is that the IRS forbids CPAs from soliciting clients for matters such as

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[7] *See* 17 C.F.R. §§ 210.1-01 et seq. (1992); *see also Matters Relating To Independent Accountants*, 6 Fed. Sec. L. Rep. (CCH) ¶¶ 73,251 & 73,295 (setting forth SEC's rulings relating to CPAs); II Louis Loss & Joel Seligman, SECURITIES REGULATION, 726-42 (3d ed. 1989)(discussing the SEC's regulation of CPAs); *see also* J.A. at 75.

[8] *See* 12 C.F.R. § 11.903 (1992) (Comptroller of the Currency); 12 C.F.R. § 335.604 (1992) (Federal Deposit Insurance Corporation); 12 C.F.R. §§ 563c.3 & 571.2(c)(3) (1992) (Office of Thrift Supervision); 17 C.F.R. § 1.16 (1992) (Commodity Futures Trading Commission).

the preparation of tax returns and giving general tax advice. However, the regulation cited by the Board proscribes in-person solicitation only where the representation involves a client in an adversarial proceeding before the IRS where the attorney, CPA, or enrolled agent actually functions as an attorney. Thus, under the IRS's regulation, anyone authorized to represent clients in contested matters before the agency would be forbidden from soliciting individuals who had, for instance, notices of tax liens or deficiencies filed against them. But the regulation has nothing to do with CPAs like Fane, who specialize in rendering advice on business tax matters and preparing tax returns for businesses. See IV Boris I. Bittker & Lawrence Lokken, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS, ¶ 110.2.1, at 110-19 (2d ed. 1992).

The Board's attempt to cushion the harshness of the ban, by arguing that a CPA "may attend trade shows, luncheon clubs, and other such meetings and engage in direct, in-person, solicitation," J.A. at 22-23, further reveals the flaws in its position. This contention is flatly inconsistent with the plain meaning of the regulation, which does not exempt solicitations merely because they take place outside of the office. More importantly, under the Board's theory that in-person solicitation facilitates fraud or abuse, the ban must operate any time there is "the opportunity for the potential client to place the soliciting CPA in a compromising position as part of the bargain reached since the CPA is obviously in need of business and may be willing to bend the rules." *Id.* at 23. The notion that a CPA can properly engage in solicitation at a luncheon meeting, but not in a client's office or over the telephone, is not only bizarre, but wholly inconsistent with the Board's rationale. The same ingredients are present in each situation -- there is a CPA attempting to sell his or her services orally to a potential client who did not initiate the conversation. Indeed, even when a CPA makes contact with the client through a newspaper advertisement or a referral, at some point, the CPA and client will meet face-to-face. It is senseless to suggest that such an encounter is more fraught with danger to the public that will eventually rely on audited financial statements simply because the CPA's initial solicitation takes place in-person or over the telephone, rather than through a referral or an advertisement.

As is apparent, the Board's argument that CPAs who engage in solicitation will be enticed into engaging in collusion or fraud simply because they have orally solicited a client's business consists of nothing more than smoke and mirrors. Although the Board bears the burden of "affirmatively establish[ing]" that the ban directly furthers the asserted state interest, *Fox*, 492 U.S. at 480, it has proffered no evidence to that effect at all, while the evidence that is available establishes that there is no nexus between CPA solicitation and fraud or abuse. Accordingly, the ban cannot be sustained.

2. The Board Has Failed To Establish That The Ban Is Needed To Prevent Overreaching By CPAs.

Recognizing the weakness of the argument that it has relied on throughout this litigation, the Board now contends that the ban, which originated as a mechanism to protect established CPAs from competitors, is needed to protect prospective clients from overreaching and undue influence by soliciting CPAs. The Board does so in its attempt bring this case within the ambit of *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), which it contends is controlling. The Board's belated effort to find shelter in *Ohralik* is unavailing.[9]

The Board's reliance on *Ohralik*, which concerned a factual and professional context far different from that surrounding this case, is misplaced. Ohralik was an experienced member of the Bar

[9] Because the Board disavowed this argument in the lower courts, it should not be considered here. Mr. Dooner's affidavit, on which the Board relies to explain the rationale underlying the ban, states that it is "for the protection of the users of financial statements. *It is not to protect the public from solicitors.*" J.A. at 20 (emphasis added). The Board's lower court briefs did not make this argument, and the Board's petition for a writ of certiorari similarly relied solely on the attest function argument, stating that "any other potential motivating factors [underlying the ban] are not relevant to the justification of the rule in question." Pet. for Cert. at 11 n.10. Although the Board discussed *Ohralik* in all of its submissions, it did so in an attempt to support its contention that the difficulties in policing face-to-face encounters increased the possibility that CPAs and clients would engage in collusion and fraud. Having renounced this argument below, the Board should not be permitted to raise it before this Court. *See Yee v. Escondido*, 112 S. Ct. 1522, 1531 n.4 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983).

who sought to represent two teenage women who were recent accident victims. 436 U.S. at 449. At the time he solicited their business, one was still hospitalized; the second had just been discharged from the hospital after nearly two weeks of care. *Id.* at 449-50. Neither had a clear understanding of her legal rights, although both apparently were aware that they had significant rights at stake. *Id.* To compound the problem, it was apparent from the outset that the two women's rights were potentially in conflict, but Ohralik nevertheless sought to represent them both. *Id.* at 450-51. Ultimately, each of the women filed a complaint against Ohralik with the local Bar, which found that Ohralik had violated the Bar's disciplinary rules. The Ohio Supreme Court agreed, and imposed an indefinite suspension. *Id.* at 454.

In affirming the suspension, the Court contrasted in-person solicitation with advertising by lawyers: "Unlike a public advertisement, which simply provides information and leaves the person free to act upon it or not, in-person solicitation [by lawyers] may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Id.* at 457 (footnote omitted). The Court was troubled that the "aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking . . .." *Id.*

These problems are particularly acute "when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed person." *Id.* at 465. In such a case, "an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence." *Id.* Thus, the Court concluded, while Ohralik's conduct was "entitled to some constitutional protection," *id.* at 459, "it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited." *Id.* at 466 (footnote omitted).

As is evident, the factual gulf between this case and *Ohralik* is deep. To start with, like its argument relating to the attest

function, the Board's thirteenth-hour claim that the ban is necessary to protect clients is not supported by a scintilla of evidence. In marked contrast to *Ohralik*, which arose in the context of a specific enforcement proceeding where there was ample evidence of overreaching, the Board has not cited a single instance where a CPA has engaged in abusive solicitation, much less sufficient evidence for the Court to conclude that oral solicitation by CPAs "more often than not will be injurious to the person solicited." *Id.* Nor has the FTC or the AICPA uncovered any such evidence. The FTC "never found any evidence that accountants have engaged in or are likely to engage in abusive solicitation" during its extensive investigation into the accountancy profession (*see* n. 10, *infra*), and the AICPA found no evidence that "direct uninvited oral solicitation is likely to lead to false, misleading or deceptive claims or oppressive conduct." J.A. at 35. In-person solicitation is permitted in almost every jurisdiction in the country. If there were any substance to Florida's fears about oppressive CPA conduct, there surely would be **some** evidence of abuse; yet Florida cites none.[10]

The absence of evidence of abusive solicitation practices by CPAs reflects the considerable differences between lawyers and CPAs. Lawyers are "trained in the art of persuasion," *Ohralik*, 436 U.S. at 465, and direct solicitation by lawyers involves "the coercive force of the personal presence of a trained advocate." *Zauderer*, 471 U.S. at 641; *Shapero*, 486 U.S. at 475. In contrast, as the district court noted, CPAs are not trained to take particular advantage of a personal encounter. To the contrary, their training places the highest emphasis on independence and objectivity. J.A. at 80; *see also United States v. Arthur Young & Co., supra*.

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[10] In advising the National Association of State Boards of Accountancy ("NASBA") to delete language from its model rule that prohibited coercive or overreaching solicitation practices on the ground that these "ambiguous restrictions" might be used to restrict "solicitation under circumstances that pose no danger of harm to consumers," the FTC stated that, "during our investigations of the accounting profession, we have never found any evidence that accountants have engaged in or are likely to engage in abusive solicitation. It does not appear likely that accountants would find abusive conduct to be an effective marketing device." Following the FTC's recommendation, NASBA amended its model rule to delete the offending language on September 24, 1988. *See* Exhibits A & B attached to Plaintiff's Motion for Summary Judgment, filed on December 8, 1988, and (continued ...)

There is also a vast difference between the sophisticated business clients whom Fane seeks to solicit, and the needs of individuals who are likely to be solicited by an attorney. Most lawyer solicitation is aimed at people who have an immediate need for specific representation, such as those arrested for driving under the influence of alcohol (*Zauderer*) or who are involved in a divorce action (*Bates*) or tort case (*Shapero/Zauderer*). In such cases, the lawyer's interest is in being retained to represent the client on one specific matter; the lawyer is not seeking to establish an ongoing relationship, and hence may conceivably resort to deceptive tactics or overreaching to obtain the client. Making matters worse, the potential client is often facing considerable stress, may need to find legal counsel promptly, and is generally unsophisticated about the law. *Ohralik*, 436 U.S. at 465 & n.24. *Ohralik* graphically illustrates the potential for overreaching where the targets of the solicitation are emotionally vulnerable.[11]

In contrast, none of Fane's prospective clients is confronting the trauma of a recent accident, the disappointment of a failed marriage, or the stigma of a criminal arrest. Rather, Fane seeks to attract a clientele of small and mid-size businesses, which have ongoing accounting needs that are sufficiently complex to justify the retention of a highly-skilled CPA on a long-term basis. The individuals who run these companies are well-educated, experienced businesspersons, who are accustomed to dealing with professionals like Fane. And, although the Board overlooks this point, the district court's order permits in-person solicitation only "in the business context," which means that the concerns about

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[10] (... continued)
Statement 8, Plaintiff's Statement of Material Facts as to Which There is No Genuine Dispute, filed on December 8, 1988, in *Fane v. Edenfield*, Civ. Action No. 88-10140 (N.D. Fla.).

[11] The same factors led a divided panel of the Fourth Circuit to uphold West Virginia's ban on oral solicitation of "pre-need" funeral contracts in nursing homes, hospitals, and residences. *National Funeral Services, Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989), *cert. denied*, 493 U.S. 966 (1990). Not only was the ban more narrowly tailored in that case, since funeral homes were free to engage in oral solicitation in places other than nursing homes, hospitals, and residences, but the state's rule was apparently based on a history of abuses. Here, in contrast, Florida's rule is categorical, and is not based on any evidence that abuses have occurred.

personal privacy and emotional vulnerability cited by the Court in *Ohralik* are not implicated in this case.

The *Ohralik* Court also supported its ruling by citing the difficulties inherent in policing a face-to-face transaction between lawyer and client -- difficulties that exist in part because there would be no record of what transpired. But that is far less of a problem with CPAs. As the district court observed, in "the CPA context . . . proof regarding alleged misconduct is readily available. The relevant financial data could be obtained" from the client and "[i]rregularities could be uncovered" because the facts in accounting "are objectively verifiable." J.A. at 88.

Lastly, *Ohralik* did not deal with a solicitation ban that was substantially underinclusive. In *Ohralik*, only an attorney could have represented the young women in their tort cases and all lawyers were forbidden from engaging in oral solicitation. In Florida, however, other financial professionals, such as accountants, tax preparers, and financial consultants, can perform many of the same functions as CPAs, but they remain free to engage in precisely the solicitation activities that are off-limits to CPAs. This is so despite the Board's insistence that a ban is needed because "[o]nly by preventing such contacts before they occur can the state prevent fraud, overreaching or misrepresentation (more likely when the CPA is engaged in tax representation, financial or management services)," Pet. Br. at 24, services which are also performed by non-CPAs. This anomaly is magnified by the fact that, whereas CPAs are subject to strict and ongoing licensure requirements, which are designed to ensure competence and good moral character, non-CPAs are unregulated by Florida. It defies logic to contend that Florida has a valid interest in protecting clients from abusive solicitation activities by licensed CPAs, but has no interest in policing the same solicitation practices of other financial practitioners, all of whom are unregulated. *Cf. The Florida Star v. B.J.F.*, 461 U.S. 524, 540 (1989)(underinclusiveness of statute raises serious doubts about whether state is serving the interests that it claims are furthered by the statute); *see also id.* at 541-42 (Scalia, J., concurring). Yet that is the Board's argument.

Respondent recognizes that, although there is no basis for the Board's claim that *Ohralik* is controlling here, this Court has continued to express concern about the potential for abuse posed by in-person solicitation. For instance, last term in *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701 (1992), the Court upheld a ban against soliciting funds in certain areas at three airports. In so ruling, six members of the Court cited the risk of fraud and overreaching that comes with the type of in-person solicitation that demands an immediate response. However, those concerns have little bearing here. The solicitation in which Mr. Fane proposes to engage will not occur in the crowded corridors of a congested airport or at someone's front-door; rather, it will take place over the telephone, at the office of the businessperson being solicited, or at a social function. The nature of the services performed by a CPA make it impossible for Fane to demand any sort of "immediate response"; all that he can ask is that the prospective client consider retaining his services. Thus, there is a built-in "cooling off period" with regard to the sale of any professional services. Nor is Fane seeking to solicit weary or otherwise vulnerable travelers. To the contrary, the relief granted to Fane by the district court allows only the solicitation of business clients. And, as noted above, the FTC has long fought against restraints on solicitation by professionals like Fane, precisely because the concerns cited by the Court in *Lee* are not present. *See American Medical Ass'n*, 94 F.T.C. 701 (1979), *aff'd sub nom. American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982); *American Dental Ass'n*, 94 F.T.C. 403 (1979).

As we have shown, the Board's efforts to find shelter for its position in *Ohralik* are wholly unavailing. *Ohralik* stands for the principle that, in truly exceptional circumstances where solicitation "more often than not will be injurious to the person solicited" (436 U.S. at 466), a prophylactic ban on certain speech may be imposed. These exceptional circumstances certainly do not exist here, where the Board has failed to offer **any** evidence of abuse. As the Court has repeatedly admonished, a state cannot base a prophylactic rule on unsupported assertions or imaginary misconduct; rather, it must back up its claim of potential harm with evidence in the record. *Zauderer*, 471 U.S. at 644-47; *see also Fox*,

492 U.S. at 480. Because Florida has failed to carry its burden of proof, its solicitation ban may not be sustained. *See also* J.A. at 76-77.

B. Florida's Ban Is Not Narrowly Tailored.

There is another reason why the Board's anti-solicitation regulation cannot withstand scrutiny under the First Amendment. The final element of the *Central Hudson* test is whether the regulation is "narrowly tailored to achieve the desired objective." *See Fox*, 492 U.S. at 480. No such showing has been made here. The Board's rule is an absolute ban, which proscribes far more speech than is necessary in light of the justifications offered for the restraint.

Throughout its brief, the Board argues that Florida's principal concern is with preserving the independence of CPAs in the attest function. Yet nowhere does the Board explain why existing regulatory requirements apart from the ban -- which flatly forbid a CPA from engaging in fraud or compromising his or her independence -- are inadequate. This is not a trivial oversight on the Board's part. The law is clear that, if the state can combat wrongdoing by direct means, it cannot use its general interest in preventing isolated abuses to justify a broad-scale restraint on speech. *See Shapero*, 486 U.S. at 476; *Zauderer*, 471 U.S. at 644, 646-47; *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *Virginia State Bd. of Pharmacy*, 425 U.S. at 768-69.

Florida has more than ample means in place to deter CPAs from engaging in fraudulent conduct wholly aside from the solicitation ban. First, an accountant who knowingly abuses the attest function engages in fraud. In Florida -- as elsewhere -- fraud is a serious crime, in most instances a third degree felony, punishable by substantial jail time. *See* Fla. Stat. Ann. §§ 817.15, 817.16, & 817.34. That alone stands as a powerful deterrent.

Second, under Fla. Stat. Ann. § 473.315, a CPA is strictly forbidden from performing the attest function "unless he and his firm are independent with respect to such enterprise." Violation of this restriction is punishable by penalties ranging from heavy

fines to license revocation. *See* Fla. Stat. Ann. §§ 473.323(b) & (c). Obviously, the threat of being cut off from one's livelihood, and the public opprobrium that would accompany a license revocation proceeding, stand as powerful deterrents. Moreover, the Board could strictly enforce the existing prohibitions that forbid CPAs from engaging in fraudulent or deceptive conduct, which plainly prohibit the very misconduct the Board says it fears. *See* Fla. Stat. Ann. §§ 473.323(f) & (k).

Third, false certification of financial statements or audits is an open invitation to tort litigation. In most jurisdictions, negligent certification can give rise to tort liability; deliberate misconduct by the CPA would almost inevitably trigger a punitive damages award. While Florida has, until recently, followed Justice Cardozo's opinion in *Ultramares v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931), which limits an accountant's liability for ordinary negligence to those in privity with the accountant, the Florida Supreme Court has announced that a CPA can be held liable to those persons whom an accountant "knows" will rely on his opinion, without regard to privity. *First Florida Bank v. Max Mitchell & Co.*, 558 So.2d 9 (1990). Moreover, the Florida courts have admonished time and again that either fraud or gross negligence opens up the accountant to third-party actions. *Investment Corporation of Florida v. Buchman*, 208 So.2d 291 (Fla.2d DCA), *cert. dismissed*, 216 So.2d 26 (Fla. 1968); *Canaveral Capital Corp. v. Bruce*, 214 So.2d 555 (Fla.3d DCA 1968); *Mulligan v. Wallace*, 349 So.2d 745 (Fla.3d DCA 1977); *Investors Tax Sheltered Real Estate, Ltd. v. Laventhol, Krekstein, Horwath & Horwath*, 370 So.2d 815 (Fla.3d DCA 1979); *see also A.R. Moyer v. Graham*, 285 So.2d 397 (Fla. 1973). Surely, the prospect of financial ruin stands as an additional, powerful disincentive to CPA misconduct.

What is more, even if the Board concluded that only a solicitation ban would suffice to deter CPAs from compromising their independence -- a conclusion virtually all other jurisdictions have rejected -- the Board's regulation is not narrowly tailored because it applies to **all** CPAs and **all** in-person solicitation by CPAs, whether or not they are seeking to conduct audits that might entail attestations. CPAs who specialize in tax, financial planning,

employee benefits, estate planning, and many other aspects of the accountancy profession, have no occasion to attest to the accuracy of audits or financial statements. J.A. at 25-26. At the very least, the Board had the duty to explore a less intrusive alternative, such as a ban limited to audit and attest function engagements. *See Shapero*, 486 U.S. at 476; *see also* J.A. at 38 & n.4. The Board's silence on this issue is especially telling in light of Florida's ban on competitive bidding by CPAs, which is limited to audit and attest engagements, making it evident that a narrower ban would be feasible. Fla. Stat. Ann. § 473.317.[12]

Other narrowly tailored alternatives exist as well. For one thing, the Board could impose a reasonable "cooling off" period, during which any client would be free to repudiate a representation agreement with a CPA and be entitled to a full refund of any monies paid. This kind of device, which is now commonplace (*e.g.*, 16 C.F.R. § 429.1 (1992)), would fully address the Board's concerns about abusive solicitation practices. Alternatively, the Board could require that all initial meetings between CPAs and prospective clients be tape-recorded, and the tapes preserved for a period of years. Not only would such a requirement serve as a powerful deterrent to abusive practices, but it would also provide the Board with an enforcement tool. Or, the Board could impose a variant of the proposal the Court made in *Shapero* regarding the regulation of mail solicitation (*see* 486 U.S. at 477), *i.e.*, the Board could require CPAs who wished to engage in direct solicitation to register with the Board, provide a written statement of the information he or she intends to disseminate, and furnish the Board with a list of those businesses the CPA contacts. But the Board has never explored these less burdensome alternatives to an outright ban.

Finally, nowhere does the Board attempt to defend its ban on telephone solicitation. All of the Board's arguments relating to

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[12] Of course, such a more limited ban would be constitutional only if there were evidence that oral solicitation facilitated fraud in the attest function by CPAs and clients, and, as respondent has shown, the Board has produced no such evidence. J.A. at 38 & n.4.

overreaching by CPAs apply, if at all, only to face-to-face encounters between CPAs and prospective clients. Whatever force those concerns may have, they disappear altogether if the client can terminate the encounter simply by hanging up the receiver. This Court has not had occasion to deal with the validity of restraints on telephone solicitation, but in terms of the danger such activity poses to the prospective client, solicitation by telephone is far closer to direct mail solicitation than to in-person solicitation because of the ease with which a telephone solicitation can be ended. If the burden of having to send an unwanted mailing on the short journey from the mail box to the trash can is too insignificant to justify a prohibition on uninvited commercial speech, as this Court has held numerous times, *see, e.g., Shapero*, 486 U.S. at 475-76, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983), *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 542 (1980), then surely the burden of having to hang up the telephone to discontinue an unwanted conversation with a CPA can be of no greater moment. *Cf. Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975). Nonetheless, the Board's prohibition applies with equal force to telephone solicitations.

As is evident, the Board has failed to satisfy the demanding standard this Court articulated in *Fox*. There is simply no evidence justifying its restriction, let alone proof that it is "narrowly tailored to achieve the desired objective." Accordingly, the decision below should be affirmed for this reason as well.

C. The Discriminatory Nature of the Ban Demonstrates That The Ban's Purpose Is To Stifle Competition, Not To Protect the Public.

Florida's ban on oral solicitation is directed only at CPAs, and not at the broad array of other financial professionals against whom CPAs compete. The discrimination promoted by the ban

both violates the Equal Protection Clause of the Fourteenth Amendment and underscores the bankrupt nature of Florida's argument that the ban serves a substantial state interest.[13]

Under Florida law, CPAs, accountants, tax preparers, bookkeepers, and other financial professionals may lawfully engage in a broad array of accountancy and financial service activities, except for the attest function. Yet only CPAs are subject to the anti-solicitation rule, and that prohibition extends to *all* services performed by CPAs, not just those requiring attestations. Every other financial professional, except a CPA, remains free to engage in any form of direct, in-person solicitation that he or she deems appropriate -- including telephone calls and personal visits.

Not only is this discrimination invidious, it is backwards and utterly irrational, since it is aimed at the only financial professionals that are regulated by the state. As noted above, **only** CPAs are licensed and directly supervised by the Board (*see* Fla. Stat. Ann. §§ 473.306-308); **only** CPAs are required to demonstrate their continuing competence and good moral character (*id.*); and **only** CPAs are subject to the Board's disciplinary procedures. *See* Fla. Stat. Ann. §§ 473.322-324. In short, if there were any justification for the solicitation ban apart from the attest function, it would apply with far greater force to non-CPAs, yet Florida prohibits only highly-regulated CPAs from engaging in solicitation.

The ban's focus solely on CPAs betrays its real goal, to suppress competition among CPAs. As noted above, not only is there no evidence that the ban serves any valid state interest, but there is every indication that the anti-solicitation rule is one of the few remaining artifacts from a time when a wide array of competitive practices -- advertising, solicitation, and competitive bidding

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[13] It makes no difference whether this Court applies heightened scrutiny to respondent's equal protection claim on the ground that the ban impinges on Fane's right to engage in speech, *cf. Carey v. Brown*, 447 U.S. 455, 461-63 (1980), the intermediate level of scrutiny the Court applies in commercial speech cases, *see Central Hudson, supra*, or even the rational basis test, *see Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), because the discrimination promoted by the ban is utterly irrational, and cannot withstand any level of review.

-- were forbidden. There can be no question about the anti-competitive lineage of the ban; its antecedent is the AICPA's "anti-encroachment rule," and the ban has existed side-by-side with the rule (also first adopted by the AICPA in 1917), now codified by Florida at Fla. Stat. Ann. § 473.317, forbidding CPAs from engaging in competitive bidding for attest function engagements. Moreover, the only CPAs harmed by the solicitation ban are new entrants into the accountancy profession in Florida, who are seriously hampered in their efforts to secure clients. The rest of the profession benefits from the ban, because it stifles competition, making it easier to retain clients and to charge high fees. *Cf.* J.A. at 58 (AICPA survey finding that CPAs who oppose solicitation fear that it "will tend to lower CPA fees").

Because of their serious anti-competitive effects, both the Justice Department and the Federal Trade Commission have long fought to eliminate barriers to in-person solicitation imposed by private organizations and state boards of accountancy. The AICPA withdrew its solicitation ban in 1979 after it was threatened with litigation by the Justice Department. In 1981, the AICPA promulgated another version of its advertising and solicitation Rule, which provided that "[s]olicitation by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct is prohibited." The FTC targeted this Rule during its investigation into the accountancy profession because it discouraged in-person solicitation, 54 Fed. Reg. 13529 (April 4, 1989), and on August 7, 1990, the FTC and the AICPA entered into a consent decree, under which the AICPA agreed to refrain from taking any action restricting or interfering with "[t]he solicitation of any potential client by any means, including direct solicitation." *See* 55 Fed. Reg. 40944 (Oct. 5, 1990)(announcing consent decree). *See also Rhode Island Board of Accountancy*, 107 F.T.C. 293 (1986)(enforcement action against state board of accountancy to force it to eliminate anti-solicitation ban).

To be sure, because the regulation at issue here was issued by a state instrumentality, it is immune from attack under the antitrust laws. *Bates v. State Bar of Arizona, supra*, 433 U.S. at 359-63. But that does not alter the fact that, despite the Board's

protests, the regulation in fact serves only the parochial interests of the entrenched members of the CPA profession, while driving up costs to consumers. That hardly qualifies as a legitimate state interest. For this reason as well, the ban cannot be sustained.

II. FLORIDA'S BAN CANNOT BE DEFENDED AS A REASONABLE TIME, PLACE AND MANNER RESTRICTION.

Apparently recognizing that the solicitation ban cannot withstand the demanding scrutiny required for outright prohibitions on commercial speech, the Board seeks to lessen the intensity of review by arguing that the ban is not really a ban at all, but is merely a time, place, and manner restriction that must be upheld as reasonable. This argument fails for three reasons. First, the Court has consistently held that complete bans on particular modes of expressive activity cannot be upheld under the time, place, and manner doctrine; second, the ban is not "content-neutral," and hence it must be subjected to the same level of scrutiny applied to all restraints on commercial speech; and third, even assuming that the time, place, and manner doctrine applies, the restriction fails that test as well, because it is not reasonable.

1. The most fundamental failing with the Board's argument is that simply calling the rule a time, place, and manner restriction does not make it so. The Board's ban does not merely regulate when, where, or how a CPA may ask a potential client to consider hiring him or her, but instead categorically forbids any effort by a CPA to engage in oral solicitation of potential clients -- everywhere and at all times.

Nonetheless, the Board contends that the regulation merely imposes a "manner" restriction, since CPAs remain free to engage in written solicitation. But none of the lawyer advertising cases decided by this Court discussed or relied on the time, place, and manner doctrine, or even characterized the restraint at issue as a "manner" restriction. *See, e.g., Zauderer, supra; Shapero, supra*. To the contrary, this Court has repeatedly ruled that blanket prohibitions aimed at particular modes of expression

cannot be justified under the time, place, and manner doctrine. *See, e.g., United States v. Grace*, 461 U.S. 171, 177 (1983); *Schad v. Mt. Ephraim*, 452 U.S. 61, 76 (1981); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977); *Virginia State Bd. of Pharmacy, supra*, 425 U.S. at 771. This Court has made clear that categorical restraints are extremely disfavored, and may be sustained only if they serve compelling interests and are drawn with an especially high level of precision. *See, e.g., Grace*, 461 U.S. at 177 ("[a]n absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest"). That is the standard that governs this case, which the Board cannot meet.[14]

2. The Board's analysis also fails because "a constitutionally permissible time, place, or manner restriction may not be based upon either the content or the subject matter of the speech." *Consolidated Edison Co.*, 447 U.S. at 536; *accord Pacific Gas & Elec. Co. v. Public Utility Comm'n*, 475 U.S. 1, 20 (1986). As the Court explained in *Ward*, 491 U.S. at 791, "[g]overnment regulation of expressive activity is content-neutral so long as it is *'justified* without reference to the content of the regulated speech.'" (Emphasis in original, citations omitted). *Accord Boos v. Barry*, 485 U.S. 312, 320-21 (1988).

Applying this principle here, it is clear that the Board's regulation is a content-based restriction which must be subjected to the more exacting scrutiny ordinarily applied to restrictions on commercial speech. There is no question that Florida's regulation can be justified, if at all, "*only* by reference to the content of the speech," *Boos v. Barry*, 485 U.S. at 321 (emphasis in original). By definition, all restraints on commercial speech are content-based in that they are imposed precisely because the state seeks to regulate some communicative aspect of a commercial transaction. What is more, the regulation has all the attributes of a classic

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[14] An example of a "manner" restraint is the regulation at issue in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), where the question posed was not when or where the rock concert could be held, but whether the city's regulation of the "manner" in which the music could be presented (*i.e.*, its decibel level) was reasonable.

content-based restraint: it is a speaker-specific, unqualified ban on a category of expressive activity, namely the direct, in-person solicitation of potential clients by CPAs. The rule forbids speech precisely **because** of its message; CPAs are free to say whatever they want, to whomever they please, whenever they want, **except** that CPAs, and CPAs alone among their competitors, are forbidden from asking potential clients for their business. In this respect, the ban is indistinguishable from both speaker-specific and content-specific restraints that this Court has held are not to be judged under the time, place, and manner doctrine.[15]

Nor is the Board on any firmer ground in its reliance on *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991). The Board argues that its ban on solicitation, like the ban on nude dancing in *Barnes*, or the prohibition against the destruction of draft cards in *United States v. O'Brien*, 391 U.S. 367 (1968), is not an effort to regulate speech, but is intended to regulate conduct, that is, abusive solicitation practices by CPAs. The Board seeks support for this argument from *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), where the Court held that a zoning restriction on the location of "adult" movie theaters could be justified by the "secondary effects" such theaters might have on the surrounding businesses and residences. Arguing that its ban is principally directed at the "conduct" and "secondary effects" of CPA solicitation, the Board contends that the Court should apply the *O'Brien* test in assessing the constitutionality of the solicitation ban.

The flaw in the Board's analysis is that *Barnes* and *Renton* involved restrictions that could be justified because they were directed at conduct -- conduct that had nothing to do with listeners' reactions to the speech. *See Barnes*, 112 S. Ct. at 2470-71 (Souter, J., concurring). But under either of the Board's

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[15] *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547-49 (1992) (penal statute forbidding "bias-motivated" crime); *Burson v. Freeman*, 112 S. Ct. 1846, 1859 (1992) (ban on distribution of political literature near polling places); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991) (statute restricting speech about crime); *Police Department of Chicago v. Mosley*, 416 U.S. 171 (1972) (ban on labor picketing).

theories, the regulation is aimed at the impact the speech might have on the listener. Thus, the Board seeks to suppress truthful oral solicitation by CPAs because it will either incite some businesspersons to seek to commit fraud, or lead some businesspersons to make ill-informed judgments about hiring CPAs. But as the Court said in *Boos v. Barry*, "[r]egulations that focus on the direct impact of speech on its audience present a different situation" than that in *Renton*, and "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." 485 U.S. at 321; *accord R.A.V. v. City of St. Paul*, 112 S. Ct. at 2549 & n.7; *Linmark Associates*, 431 U.S. at 94. Accordingly, because Florida's solicitation ban is plainly content-based, the time, place, and manner doctrine is inapplicable.

3. Finally, even were the Court to apply the time, place, and manner doctrine, that would not save the ban because the restriction is not reasonable. The Board appears to contend that, because it can **theorize** (but not adduce evidence showing) that harm could result from oral solicitation, the ban should be upheld as a mere "manner" restraint. But the Board's effort to equate time, place, and manner review with low-level rational basis review is plainly in error. This Court has repeatedly made clear that time, place, and manner review is an intermediate standard which requires reasonably precise regulation in the furtherance of an important governmental interest. Indeed, the time, place, and manner test incorporates several features that parallel the analysis established for restraints on commercial speech in *Central Hudson*: the state bears the burden of proving that the restraint is "narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward*, 491 U.S. at 798; *accord Schad*, 452 U.S. at 76; *Lindmark Associates*, 431 U.S. at 94.

As we have shown, the Board has failed to meet that burden. Florida's ban is a paradigm of an unreasonable regulation. The Board has mustered no evidence that the ban serves **any** valid public purpose, let alone a substantial one. To the contrary, the ban is a textbook example of protectionism at its worst because it preserves the financial interests of the entrenched members of the profession at the public's expense. The Board's claim that

Florida's ban serves a substantial state interest is further belied by the ban's underinclusiveness; if Florida feared abusive solicitation practices, it would forbid solicitation by all financial professionals who perform functions similar to those performed by CPAs, yet only CPAs are forbidden from engaging in solicitation.

Florida's ban also proscribes far more speech than is necessary to achieve its asserted goals. Florida states that its ban is primarily aimed at preserving the integrity of the attest function -- but its ban is a blanket one, preventing even CPAs who never attest to the accuracy of financial statements from offering all the non-attest services they provide, including a wide array of services also offered by competing professionals who are permitted to engage in oral solicitation. Florida also has ample and direct means to deter abusive solicitation practices and fraud without resorting to an outright ban. The Board has nowhere explained its failure even to consider regulatory approaches short of a categorical ban, such as a reasonable "cooling off" period during which clients would be free to terminate agreements entered into with a CPA. These and the other options open to Florida would address the State's concerns, yet none has even been considered. To the contrary, Florida has done precisely what this Court has condemned in prior cases; it has imposed a sweeping, anti-competitive ban on the basis of nothing but speculation about possible isolated abuses. Accordingly, even under the time, place, and manner doctrine, Florida's solicitation ban violates the First Amendment and must be set aside.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

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In The

Supreme Court of the United States

October Term, 1992

FRED H. EDENFIELD, et al.,

Petitioners,

v.

SCOTT FANE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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ARGUMENT

I. Since A State May Prohibit Cold Call Solicitation By Its Attorneys, It May Similarly Regulate Its CPAs.

Florida bans any "cold call" solicitation[1] of prospective clients by both accountants and attorneys.[2] This Court's *Ohralik*[3] decision stands for the proposition that a State professional licensing agency may prohibit attorney cold call solicitation of prospective clients for *any* purpose, and Respondent Fane ("Fane") does not argue to the contrary.[4]

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[1] As in its initial brief, Petitioners, the members of the Florida Board of Public Accountancy (the "Board"), use the term "cold call solicitation" to refer to any uninvited direct, personal communication, whether face-to-face or over a telephone.

[2] Section 21A-24.002(2) provides "[a] licensee shall not by any direct in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . [c] where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such communication." Section 21A-24.002(3) makes unlawful "any communication which directly or implicitly requests an immediate oral response from the recipient." Collectively, these provisions are described herein as "the Rule". Rule 4-7.4(a) of the Florida Rules of Professional Conduct, Rules Regulating the Florida Bar, similarly prohibits cold call solicitation by Florida attorneys.

[3] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

[4] Nor could he. As this Court said in *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 475 (1988):

> Our decision in *Ohralik* that a state could categorically ban *all* in-person solicitation turned on two factors (emphasis added).

See also, Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626 (1985); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990). Ohio's rule as to attorneys in *Ohralik* banned *all* cold call attorney solicitation (then DR 2-102(A) and DR 2-104(A), quoted

(continued...)

Fane nonetheless relies, together with the majority of the Court of Appeals below, on the "unique facts" regarding Ohralik's solicitation[4] to limit the impact here of *Ohralik*. Fane's position misreads *Ohralik* which, today, stands for the permissibility of a total ban on *all* cold call attorney solicitation, whether the solicitation offers tax representation (where the attorney and CPA may perform identical functions), business representation (where the client may be as sophisticated as the attorney or CPA, and may be identical as between the attorney and CPA),[5] or a particular "personal" representation where "special facts" such as overreaching of an emotionally distraught victim might be a factor.[7]

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[4](...continued)
in *Ohralik*, 436 U.S. at 453, at fn. 9) and, in this regard, has not changed. *See* Ohio Code of Professional Responsibility, DR 2-103. In fact virtually all states derive their disciplinary rules from the American Bar Association's Model Rules of Professional Conduct or its precursor Model Code of Professional Responsibility, both of which bar virtually all cold call attorney solicitation. *See* American Bar Association Model Rule 7.3 and DR 2-102 of the Model Code.

[5] The "unique facts" involved in *Ohralik* were the nature of cold call solicitation itself, not the condition, age, or sex of the persons Ohralik actually solicited. This is made clear in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985); *see also, Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 481 (1988) (O'Connor, J., dissenting).

[6] As noted above, the ABA Model Rules and virtually all related state codes of professional responsibility for attorneys prohibit *all* cold call solicitation for profit, of whatever client for whatever purpose. At least as to these two categories of clients (tax and business), the conclusion of the District Court below that the "two groups of potential clients that are targeted for solicitation [by CPAs and attorneys] are in significantly different positions" (J.A. at 84) is simply wrong.

[7] The fact that not all states have determined to prohibit direct, in-person uninvited solicitation by CPAs does not invalidate the judgments of the states that do have such prohibitions. The states should be entitled to "broad latitude" and deference in exercising their power to regulate the learned professions and to protect the public and the profession from abuses. *See* (continued...)

This Court, in stating its support for a prophylactic ban in *Ohralik*, acknowledged state licensing agencies have the right to proscribe this type of solicitation in the name of the professional standards the State has required them to impose, regardless of whether the solicitation could, in fact, be shown to be false, fraudulent, or otherwise subject to censure. *Ohralik*, 436 U.S. at 464; *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

The issue before this Court is whether there is something sufficiently peculiar about attorneys that allows a State to bar cold call solicitation of prospective clients by attorneys, but prohibits the State from imposing a similar limitation on its CPAs or other learned professionals.[8] The Board submits that Fane's attempt to distinguish CPAs from attorneys is an irrelevant distinction with no logical difference. Once any consideration of "special or unique facts" is eliminated (as this Court did in *Ohralik*), there is no difference in the State's right to set the same anti-solicitation rule for all learned professionals subject to its regulation.[9] This is not

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[7](...continued)
Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 2297-2298 (1990) (O'Connor, J., dissenting).

[8] Recently the Florida Supreme Court in *Garden v. Frier*, __ So.2d __, 17 FLW S381 (1992) was asked to determine whether a land surveyor was a professional so as to avail himself of a shorter statute of limitations for "professional" malpractice. The Court determined that, for that purpose only, a "profession" in Florida required as a minimum, (i) licensing, (ii) specialized knowledge and (iii) academic preparation amounting to at least a four-year university level degree in the field of study specifically related to that calling. *See also, Pierce v. AALL Insurance Inc.*, 531 So.2d 84 (Fla. 1988).

[9] This Court in upholding the Board's ban on cold call solicitation by CPAs need not determine the comparability of learned professionals other than CPAs to attorneys (or CPAs). The Board is concerned only with the comparability of CPAs to attorneys. The dissent below suggested that attorneys and CPAs are "more alike than they are different," noting that the rationale for *Ohralik* is really based on "the gap in knowledge between the professional and the lay person;" that "[t]o think that clients may be as vulnerable to a seemingly knowledgeable CPA as accident victims are to an ambulance chasing attorney is not unreasonable;" that while clients of CPAs (continued...)

to suggest that such rules should apply to non-members of learned professions, such as those involved in direct marketing of "generally available products and services."[10/]

Fane's insistence that there be current empirical evidence showing a necessity for the Rule not only ignores this Court's holdings in *Ohralik*, *Shapero*, and *Zauderer*, but creates a nearly impossible burden for the Board.[11/] As the AICPA Report[12/] shows, the AICPA in 1981 had no empirical evidence that cold call solicitation had been overreaching or abusive, or that it had resulted in false, fraudulent, or deceptive actions by CPAs of their clientele. Nor is there any indication the Florida legislature or the Board had before it such evidence in adopting the challenged ban on such solicitation.

The Rule was adopted for its prophylactic purpose, not because of any empirical evidence necessitating it.[13/] Furthermore, as the Rule has been in effect since 1979 and is based upon earlier prohibitions contained in the AICPA Code of Ethics, compliance with the prohibition[14/] would have prevented the accumulation of evidence as to the impact of non-compliance. The Florida Fourth District Court of Appeal, in upholding the enforceability of the Rule, also recognized the inherent impracticality of demanding "empirical evidence" of abuse. *State Department of Professional Regulation, Board of Accountancy v. Rampell*, 589 So.2d at 1357.

The Rule bars *all* cold call solicitation by CPAs, although, as the Dooner affidavit[15/] reflects, its rationale was focused on the CPA "attest" function. It is that function that initially set CPAs apart from others performing accounting services. Today's

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[9/](...continued)
may not be "under the kind of emotional distress that a potential personal injury client would be under," a CPA client "has a great deal to lose;" that there is "an incentive for fraudulent CPAs;" and there is a "heavy reliance that the public places in the accuracy of financial statements," (comparable to the attorney's public posture as an officer of the court). ***Fane v. Edenfield***, 945 F.2d 1514, 1520-23 (11th Cir. 1991).

[10/] The *amici curiae* brief filed by the American Advertising Federation, Association of National Advertisers, Inc., Direct Marketing Association, Inc. and Olan Mills, Inc. in support of Fane perceives the Board's position to be one of seeking a generalized ban on all telephone solicitation. This is *not* the Board's position. In fact, the Board endorses this statement of the advertising industry:

> [t]he interests of the states in regulating the practice of professions within their borders is plainly different from -- and more substantial than -- its interest in restricting protected communications of advertisers and marketers of generally available products and services.

Amici Curiae Br. at 9, fn. 8. The Board has proffered that Florida's ban on cold call solicitation is consistent with *Ohralik* and the First Amendment, by reason of the fact that CPAs are members of a regulated "learned profession", as well as the specific similarities detailed in the dissent below (*see* fn. 9, *supra*). The Board makes no contention that a similar ban on direct marketing of "generally available products and services " would likewise be consistent with the First Amendment. That is not the issue before this Court.

[11/] *See also, Accountant's Society of Virginia v. Bowman*, 860 F.2d 602, 605-606 (4th Cir. 1988) (Board of Accountancy was not required to make an evidentiary showing at trial in order to establish the misleading nature of the use of the term "public accountant" by unlicensed accountants).

[12/] American Institute of Certified Public Accountants, Report of the Special Committee on Solicitation (Sept. 1981) (J.A. 29-77, at 38-39).

[13/] It may be equally noted that nothing in *Ohio State Bar Association v. Ohralik*, 357 N.E.2d 1097 (1976), or the briefs in that case to this Court, indicates that the Ohio Bar Association had any such empirical evidence before it in adopting or enforcing its comparable prophylactic rule.

[14/] As Fane points out (Brief at 7), the order of the District Court below (voiding the Rule) has now been in effect for two years. As Fane does not point out, the ban on cold call solicitation imposed by the Rule has been upheld in *State Department of Professional Regulation, Board of Accountancy v. Rampell*, 589 So.2d 1352 (Fla. 4th DCA 1991), *appeal docketed*, No. 79,371 (Supreme Court of Florida, February 17, 1992) (oral argument set for May 1993).

[15/] Affidavit of Louis W. Dooner, filed by the Board below (J.A. 16-23).

accountants do many other things, and, specifically, as both the Board's initial brief and Fane's brief acknowledge, offer tax advice and management services. The Rule has valid purpose in its prophylactic sweep impacting all CPA services, which purposes are enumerated in the Board's initial brief (at 22-25). And while Fane charges the Board with changing its reliance on the "purpose" of the Rule, this Court has opined that its "appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature . . . ." *Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456, 2469 (1991) (Souter, J. concurring).

Fane's challenge, based on an assertion he does not desire to exercise (at least, *generally*) the "attest" function (J.A. 25) rings hollow, since the services he says he chooses to perform, he may perform by simply electing *not* to be a CPA.[16/] In fact, Fane's posture is contradictory. He says that *generally* he does not desire to perform the "attest" function, but he most certainly does not preclude himself from doing so.[17/] Fane's primary reason for choosing to become a CPA[18/] was presumptively to be able to perform that function, since that is the focus of Florida's CPA law (*see* § 473.301, Fla. Stat.), although he may also have acquired a certain cachet by being able to describe himself as a CPA. It

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16/ It is unclear whether Fane desires to represent taxpayers before the Internal Revenue Service ("IRS"), in which case, he could not cold call solicit the representation of the taxpayer (see Board's initial brief at 22-23, 30), even if he elected not to be a CPA. He speaks of his "expertise . . . in commercial taxation" (J.A. 10) and says he is one of the accountants "who specialize in corporate and individual tax . . . ." (J.A. 25)

17/ Fane refers to "accountants, like myself who . . . seldom, if ever, exercise the attest function." (J.A. 25, emphasis added) Being a CPA, he *may* exercise the "attest" function and accepts the continuing education and other requirements imposed by the Board to ensure his continuing ability to do so and, otherwise, to use Fane's words, to "maintain a high level of professionalism." (J.A. 26)

18/ Fane was, from 1977-1981, an accountant, capable of performing what he says he generally now wants to do, but chose in 1981 to become licensed as a CPA in New Jersey. In 1985, on moving to Florida, he chose to become a Florida CPA. (J.A. 9-10)

hardly behooves Fane to argue that he should be able to engage in inherently unregulatable cold call solicitation because he does not (except "seldom, if ever") want to exercise the "attest" function, when he *may* do so, and the Board is unlikely to ever know whether he did or not.

Fane further contends that the Board is not entitled to "find shelter in *Ohralik*" because it allegedly "disavowed" below an argument that the Rule was necessary "to protect prospective clients from overreaching and undue influence by soliciting CPAs." (Fane's Brief at 22). However, Fane concedes the Board argued *Ohralik* in "all of its submissions," and is simply wrong in his contention that the Board somehow "renounced" a particular argument.[19/] For example, the Dooner affidavit made clear that the Rule is designed to prevent both "overreaching and vexatious conduct by the CPA" and "the opportunity for the potential client to place the soliciting CPA in a compromising position." (J.A. 23). The dissent below viewed the Board's ban on cold calls as curbing an "incentive for fraudulent CPAs," among other things. *Fane v. Edenfield*, 945 F.2d at 1522. Similarly, the District Court below specifically referred to the Board's "argument that a blanket prohibition of in-person, direct, and uninvited solicitation by CPAs is necessary because of the difficulties in proving the occurrence of misconduct . . . ." (J.A. 87-88).

Fane and his supporting amici are uncomfortable with *Ohralik* for good reason. If *Ohralik* controls, as the Board contends it does, a State that is permitted to prohibit cold call solicitation by its state-licensed attorneys must also be allowed to prohibit cold call solicitation by its state-licensed CPAs.

19/ *See*, the Board's petition for writ of certiorari to this Court, pg. 7, 9, 11-19, 22; Joint Appendix 82-85; the Board's initial brief to the Court of Appeals, at 15, 31-35, 39-46 in the District Court; the Board's reply brief to the Court of Appeals, 9, 13-17; the Board's response in the District Court to Fane's motion for summary judgment at pg. 6-8, 10, 12-16. *See also*, Brief of *Amicus Curiae* Florida Institute of Public Accountants in support of the Board, at 6, 8-10, 14-16, 20-21; and brief of the same Amicus to the Court of Appeals at 9-14, 17, 18, 21, 22.

II. Florida's Ban On Direct, In-Person Solicitation By CPAs Furthers A Substantial State Interest, Is Narrowly Tailored To Meet The Desired Objective, And Does Not Violate The First Amendment.

In making his facial challenge to the Board's Rule, Fane misinterprets and misapplies the *Central Hudson*[20] test. Fane does not dispute that preservation of a CPA's independence and integrity is an important State goal, *cf. United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), as is the prevention of fraud, overreaching and misrepresentation. Yet Fane overlooks the fundamental fact that cold call solicitation has been determined to be a practice "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. at 641 (1985), citing *Ohralik*, 436 U.S. at 464-65.[21]

Fane also ignores the fact that this Court has recognized the right of a State to regulate licensed professionals by making a determination that cold call solicitation is a mode of communication so subject to abuse as to be "inherently misleading." *See In re R.M.J.*, 455 U.S. 191, 203 (1982). As such, it may well be, as the Fourth District Court concluded in *Rampell*, that the *first* prong of *Central Hudson* is problematic for Fane. *State Department of Professional Regulation, Board of Accountancy v. Rampell* at 1355, relying on *In re R.M.J.*

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[20] *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

[21] "Misleading commercial speech is beyond the protective reach of the First Amendment." *U.S. v. DeFusco*, 930 F.2d 413 (5th Cir. 1991), *cert. denied*, __ U.S. __, 112 S.Ct. 239 (1991), citing *Vidal Sassoon, Inc. v. Bristol Myers Company*, 661 F.2d 272, 276 n.8 (2d Cir. 1981).

Fane's analysis of the third and fourth prongs of *Central Hudson*[22] confuses advertising, which is not the subject of the Rule's ban, and solicitation, which is. Public advertising differs in important ways from the conduct regarded as solicitation. While advertising uses public channels of communication and is not addressed to particular individuals, solicitation involves a private, direct, personal contact with the potential client to hire a particular accountant for a specific purpose. Solicitation, by its nature, cannot be monitored as can public advertising, and is thus subject to greater abuse.[23]

Solicitation is more than advertising, in that it involves nonspeech elements, such as personally approaching a prospective client and being one-on-one with him. As such, solicitation involves a course of conduct[24] that is simply not a part of public advertising. Although including a speech component, like offers to sell securities or employer's threats of retaliation for employees' labor actions, solicitation is conduct for purposes of governmental

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[22] These words from *In re R.M.J.*, 455 U.S. at 203, fn. 15 must be remembered:

> . . . the *Central Hudson* formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized profits or services are offered to the public.

[23] As the Court has stated, "the admonition that 'the fitting remedy for evil counsels is good ones' is of little value when the circumstances provide no opportunity for any remedy at all." *Ohralik* at 457.

[24] "We agree that the appropriate focus is on appellant's *conduct* [. . .]." *Ohralik*, at 463 (emphasis added). "In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component." *Id.* at 457. "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." *Id.* at 459.

regulation. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 (1949). As this Court has noted:

> Billboards, then, like other media of communication combine communicative and noncommunicative aspects. As with other media, the government has legitimate interests in controlling the noncommunicative aspects of the medium, *Kovacs v. Cooper*, [336 U.S. 77 (1949)]
> . . . .

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 502 (1981).

This Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977), recognized that certain professional advertising is deserving of some constitutional protection because it may serve important "societal interests in assuring informed and rational decision-making." However, advertising of the type addressed in *Bates* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), is fundamentally different from solicitation. Solicitation involving personal persuasion and expedited decision-making is likely to discourage prospective clients from engaging in the critical comparison of the "availability, nature and prices" of services, which this Court recognized in *Bates* "performs an independent role in the allocation of resources in a free enterprise system." *Bates*, 433 U.S. at 364. Consistent with this reasoning, this Court premised its four-part test regarding restrictions on commercial speech with a recognition that "the government may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563.

Here, Fane does not pretend his cold call solicitation is calculated to "inform." Rather, he admits he wants to "persuade" others to hire him because his services are "superior."[25] In doing

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[25] Fane admits if given the opportunity to conduct cold call solicitation, he intends to "persuade." He does not want to give an independent objective (continued...)

so, his communications will be secret, outside the public marketplace. His competitors will be unable to respond or refute his statements because they will not even know when such discussions occurred or what was said. Likewise, Fane acknowledges there is no prohibition on an accountant soliciting any person or entity by way of written communication. The Rule thus does not prohibit the dissemination of information regarding the availability of services: it just proscribes one method of the communication.

The fourth prong of *Central Hudson* does not require that the Rule be the "least restrictive" necessary to achieve the governmental purpose asserted. In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), this Court specifically rejected any such requirement, and held there must be only a "reasonable fit" between the government's asserted purposes and the means by which the government chooses to accomplish those purposes. *Fox*, 492 U.S. at 476. Given the inherent unregulatability of cold call solicitation, the Board's prophylactic Rule constitutes a "reasonable fit" between the regulation and the substantial state interests served.[26]

Fane further complains that even if there is justification for a ban on face-to-face solicitation, there is no justification for a ban

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[25](...continued)
opinion about his professionalism; he wants to persuade others, in face-to-face discussion, that his services are "superior" to those of other CPAs. (J.A. 11-12) But "[t]he court [in *Bates*] suggested that claims as to the quality . . . might be so likely to mislead as to warrant restriction," even if written. *In re R.M.J.*, 455 U.S. at 201. Furthermore, even if Fane were permitted to conduct cold call solicitations, the content of his message would still be subject to prohibition to the extent it creates expectations that cannot be objectively proved. *See* Rule 21A-24-001.

[26] Florida's Fourth District Court of Appeal found the Rule reasonably fit the state's purpose in *Rampell*. *See also, Greenberg v. Michigan Optometric Ass'n., Inc.*, 483 F. Supp. 142, 146-147 (E.D. Mich. 1980) (holding that the state prohibition on personal solicitation by optometrists was not a violation of the First Amendment given the difficulties regulating one-on-one solicitation).

on telephone conversations. Fane contends the potential client can simply hang up if he does not wish to discuss with Fane the alleged "superiority" of the services he offers. This is rarely true. Fane concededly is not interested in prerecorded messages; he wants to call fellow members of such clubs as the local chamber of commerce. The Board is entitled to believe that fellow members of a chamber of commerce are unlikely to be rude and simply hang up on Fane, to the same extent as that a possible client would be unlikely to be rude and just walk away, were the discussion face-to-face. The Board is entitled to proscribe both.

Fane's suggestions for modifying the Rule also are without merit. Fane's suggestion that telephone conversations[27/] with potential clients be taped, for example, is illegal and impractical. Likewise, Fane's suggested "cooling off" period, which is intended for the return of consumer goods, is equally inappropriate, as it reduces CPAs to the status of sellers of Florida homesites[28/] and residential solar water heaters.[29/]

III. The Board's Rule Bolsters CPAs Independence As They Perform The Attest Function.

Fane claims the Board's Rule should not be validated because, he speculates, a CPA's independence becomes threatened only *after* he becomes involved in his client's affairs. Fane's Br. at 18.[30/] This a is distinction with no logical difference. While a

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[27/] Florida law makes criminal most unconsented recordings of telephone conversations. § 934.03, Fla. Stat. (1991).

[28/] § 498.023, Fla. Stat. (1991) (land sales).

[29/] § 501.025, Fla. Stat. (1991) (home solicitation rules).

[30/] Fane alludes to only two practices, simultaneous performance of non-audit management advisory services ("MAS") and audit services by CPAs and "opinion shopping" by clients, as threats to the CPA's independence. Fane argues that impairment of independence occurs only if a CPA could lose an existing client. Fane does not, however, explain why the CPA's fear of *never receiving* the client's lucrative business (the impetus for cold call (continued...)

CPA's independence may well be compromised after the client relationship is established and a CPA's performing management advisory services ("MAS") may also threaten independence, this does not explain how or why the danger of cold call solicitation is mitigated, much less eliminated. The existence of abuse in MAS and in "opinion shopping" after the CPA-client relationship is established only confirms the validity of the Board's concern about unregulatable efforts to establish the relationship in the first place.

A paramount concern for the CPA who desires to perform the "attest" function is not simply to *be* independent but to *appear* to be independent.[31/] In light of the reliance of the market and the public on audited financial statements, there are two equally important forms of auditor independence: independence in fact and independence in appearance. *Matters Relating to Independent Accountants*, 6 Fed. Sec. L. Rep. (CCH) ¶ 73,251 (1992); *note*, *The Big Eight, Management Consulting and Independence: Myth or Reality*, 61 Cal. L. Rev. 1511, 1520, 1526-27 (1988). Independence in fact encompasses "'intellectual honesty' and the absence of an obligation to any financial statement users." 61 Cal. L. Rev. at 1520, citing Berryman, "*Auditor Independence: Its Historical Development and Some Proposals for Research*," in *Ethics in the Accounting Profession*, 141, 155 (1978). Independence in appearance is "'the perception of the auditor's independence by parties interested in audit reports.'" *Id.*

[30/](...continued)
selling) is not a legitimate basis for regulating CPA conduct, while acknowledging that the fear of losing already existing business is a legitimate ground. The Board has as much regulatory concern with the creation of the CPA-client relationship as with its preservation.

[31/] As stated by Sternberg, *Cooked Books: Practices of Large Accounting Firms Contributed to Financial Scandals*, Vol. 269, No. 1, The Atlantic, 20, 22 (January, 1992), "Many people believe that auditors play detective, digging out aberrations and blowing the whistle at the slightest hint of wrongdoing. A clean audit is seen as akin to the Good Housekeeping Seal of Approval, stamped by wizened veterans who have carefully combed through the records and carefully tracked down every lead."

The Board's regulation of CPA cold call solicitation advances the CPA's overriding need both to *be* independent and to *be perceived* as independent. Rigorous competition for CPA services may compel CPAs to take positions they might not otherwise take, particularly when companies convey their willingness to "opinion shop" for favorable audits. Goelzer, *The SEC and Opinion Shopping: a Case Study in the Changing Regulation of the Accounting Profession*, 52 Brook. L. Rev. 1057, 1058 (1986).[32] Because uninvited solicitation is inherently unregulatable, it provides the CPA an opportunity to express his willingness to perform a favorable, rather than an objective, audit. The CPA's improper message may be conveyed through an outright statement of fact, a vocal intonation, or simply by the sheer novelty of a call from a stranger who wishes to sell his purportedly objective (albeit "superior") skills. By foreclosing such signaling, the Board strengthens CPAs actual independence.[33]

Fane also argues that CPAs are not formally trained in the arts of persuasion and advocacy, and therefore their sales endeavors are more likely to involve benign presentations of fact, rather than arm twisting and professional gamesmanship. Fane's Br. at 24-25. This assertion defies reality. CPAs are -- and must be -- advocates in numerous contexts. When a CPA performs an

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[32] Analyzing CPAs' roles in a litany of financial scandals, one commentator notes "As the audit firms became more competitive and bottom-line oriented, the pressure to retain fee-paying clients and perform quick audits overwhelmed concern about the firms' long-term reputations." Sternberg, *supra* at 25.

[33] CPAs' reputations in the attest function have incontrovertibly fallen on hard times. *See Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991), *cert. granted*, __ U.S. __, 112 S.Ct. 1159 (1992); Goelzer, *supra* at 1057; *also* Sternberg, *supra*. The opportunity to make undetectable improper or fraudulent representations to a potential client impacts both actual and apparent independence. Even if the CPA promises to and in fact does fulfill his audit duties impeccably, the inescapable conclusion in many potential clients' minds (and the general public) may be that the CPA *might* not give an accurate rendering.

MAS assignment, he so acts. 61 Cal. L. Rev. at 1525. Similarly, when CPAs lobby for or otherwise urge a favorable tax position or policy for their clients, they so act. *The Accounting Establishment*, A Staff Study of the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Operations, S. Doc. No. 95-34 at 52, 95th Cong., 1st Sess. (March 31, 1977). Fane can hardly argue that CPAs will discard advocacy skills when they place uninvited solicitation calls to potential clients.[34]

IV. The Rule Does Not Violate The Equal Protection Clause, Nor Does It Prevent Competition.

Fane contends the Rule violates the Equal Protection Clause[35] because "other financial professionals" may engage in solicitation. (Fane's Br. at 32). Fane offers no definition of "professional," nor is there any citation to the record to support his assertion. The simple fact is that Fane *chose* to become a CPA; presumably because, along with his Masters in Taxation [J.A. 9], it gave him a title that he could use to secure business not available to him as an "accountant," "tax preparer," "bookkeeper," or "other financial professional", whatever those terms may mean. Fane sought the CPA's certificate, with all the benefits that go with it, but does not want to accept the burdens of being a licensed learned

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[34] As the dissent below noted:

> Anyone who has ever signed, without fully understanding, a tax return or other financial statement prepared by a CPA simply because the CPA says, "you sign here," knows just how persuasive a CPA can be."

Fane v. Edenfield, 945 F.2d at 1522.

[35] The District Court, although not reaching "plaintiff's equal protection argument" observed:

> "Only CPA's [sic] perform the attest function, therefore the prohibition does not restrict other providers of related financial services" and commented "that point seems to dispose of the . . . argument . . . ." (J.A. 79, fn. 3)

professional, one of which is the responsibility of complying with rational professional standards set by the Board.[36]

Since only a rational distinction is required to justify differential treatment under the Equal Protection Clause, certainly it is rational to require that persons who elect to bear the title of CPA solicit in a manner such that the nature of their solicitation can be reviewed by the Board that authorizes them to bear that title.[37] As was recently said, with respect to the medical profession:

> Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Planned Parenthood of Southeastern Pennsylvania v. Casey, ___ U.S. ___, 112 S. Ct. 2791 (1992). (Joint Opinion). Those who are licensed may be held to a higher standard of professionalism just because the public perceives them to be, and relies on them, as professionals.

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[36] Fane's appellation, "CPA," is inherently valuable, and permits Fane to distinguish himself from others not so titled. *See Accountant's Society of Virginia v. Bowman*, 860 F.2d 602, 605 (4th Cir. 1988).

[37] Fane tries to analogize targeted direct mail to cold calls. The analogy fails. Targeted direct mail is written, and as such is reviewable. For that reason, a direct personal written solicitation, such as that involved in *In re Primus*, 436 U.S. 412, 416 n.6 (1978), is permitted by the Board. Fane's argument that the Rule is "speaker-specific" is equally without merit. The Board has authority to regulate its licensed CPA's. Thus, by definition, the Board's authority is limited as to the accounting profession, and *all* its rules are "speaker-specific" to that profession.

Fane further argues the ban suppresses competition within the profession by hindering efforts of new entrants to attract clients. (Fane's Br. at 33). This argument too, is fallacious. It is Fane who would decrease competition within the profession, by being able to make private one-on-one comments to clients of his competitors without them even knowing what he is saying, thus denying them any effective chance of competing. *Cf. State Department of Professional Regulation, State Board of Accountancy v. Rampell, supra.* Further, one-on-one contacts discourage competition, since in many instances the consumer has no basis for evaluating the offer being made to him. Rather than promoting the "free flow of economic information," Fane's cold call solicitation will serve only to decrease the amount of information available in the public marketplace.[38]

V. Florida's Rule Is A Reasonable Time, Place And Manner Restriction.

Relying upon *Virginia State Board of Pharmacy* and *Bates*, Fane contends the Rule is not a reasonable time, place and manner restriction because it is a prophylactic ban on a particular mode of expressive activity, and because it is not "content-neutral." Fane's contention misapplies the Court's holdings in those cases to the facts established here. In this case, the Rule is narrowly drawn, and affects only a mode of expression, not the speech itself. Fane is permitted to deliver his message in any mode other than through cold call solicitation. The Rule is thus fundamentally different from the regulations challenged in *Virginia State Board of*

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[38] Fane also makes an "underinclusiveness" argument, apparently overlooking (although citing) this Court's decision in *R.A.V. v. City of St. Paul, Minnesota*, __ U.S. __, 112 S.Ct. 2538 (1992), in which this Court noted the First Amendment imposes "not an 'underinclusiveness' limitation, but a 'content-discrimination' limitation upon a state's prohibition of proscribable speech. There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be 'underinclusive,' it would not discriminate on the basis of content." The Rule does not discriminate on the basis of content, and thus there is here no valid argument for "underinclusiveness."

Pharmacy and *Bates*, which regulations sought to ban the message itself--not simply the medium through which the message could be delivered.[39/]

Fane further errs in his contention that "none of the lawyer advertising cases decided by this Court discussed or relied on the time, place, and manner restriction doctrine." (Fane's Br. at 34). In fact, as this Court observed in *Bates*,

> In holding that advertising by attorneys may not be subject to blanket suppression, and that the advertising at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. . . . As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. *See Virginia State Board of Pharmacy v. Virginia Council*, 425 U.S. at 771, 96 S.Ct. at 1830.

433 U.S. at 383-84. And, as noted above, this Court in *In re R.M.J.* confirmed the right of state licensing professional to ban "inherently misleading" solicitation.[40/]

Nor is *Boos v. Barry*, 485 U.S. 312, 320 (1988), also relied on by Fane, to the contrary. In that case, which involved the ban on certain "unfriendly" political speech, this Court observed:

[39/] "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference." *Shapero*, 486 U.S. at 475.

[40/] Not only is the Rule a reasonable time, place and manner restriction, but it is also content neutral. Fane cites to *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) as saying "[g]overnment regulation of expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech'" (emphasis in original). But this proposition *supports* the Rule, for where a person can deliver a message through any medium save one (cold call solicitation), the restriction must by its very nature be content-neutral.

> So long as the justifications for regulation have nothing to do with content, i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded [in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)] that the regulation was properly analyzed as content-neutral.

Id. at 320.[41/]

Here, the Board's Rule has nothing to do with the content of Fane's message; it would be equally applicable were Fane simply to deliver his name and address, or affirmatively to misrepresent his services. Fane can deliver his message through any medium other than cold call solicitation; and with respect to such cold calls, the specific message does not matter. It is the use of the medium the Board prohibits, not the message.

[41/] The *Amici Curiae's* reliance on *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) is also misplaced. This Court did not mention *Linmark* in *Ohralik*, and patently did not consider it relevant. In *Linmark* this Court recognized the challenged ordinance was actually an attempt to control the message (that a house was for sale) rather than the method of communication. The Court noted other signs were not barred, only "for sale" signs. Thus the ordinance attempted to stop sales of homes in a racially integrated neighborhood by prohibiting the best way of selling -- a "for sale" sign on the house.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed; and the courts below should be directed to enter judgment in favor of Petitioners Fred H. Edenfield, et al., upholding the facial constitutionality of the Board's Rule prohibiting direct, in-person uninvited solicitation of potential clients by Florida licensed CPAs.

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No. 91-1594

In The

Supreme Court of the United States

October Term, 1992

FRED H. EDENFIELD, et al.,

Petitioners,

v.

SCOTT FANE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF AMICUS CURIAE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, in Support of Petitioners

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Florida's prohibition of direct, in-person, uninvited solicitation of potential clients by licensed Certified Public Accountants (CPAs), enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is an unconstitutional restriction of a CPA's First Amendment right of commercial speech?

2. Whether a state prohibition of direct, in-person, uninvited solicitation of potential clients by licensed Certified Public Accounts (CPAs), enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is a valid, time, place, and manner restriction of a CPA's First Amendment right of commercial speech?

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No. 91-1594

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

FRED H. EDENFIELD, et al., Petitioners,

v.

SCOTT FANE, Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CONSENT OF THE PARTIES

Petitioners, Fred H. Edenfield, et al., and Respondent, Scott Fane, have consented to the Florida Institute of Certified Public Accountants participating in these proceedings as Amicus Curiae in support of Petitioners. Their consents have been filed with this Court.

INTEREST OF AMICUS CURIAE

The Florida Institute of Certified Public Accountants ("FICPA") is a Florida not-for-profit corporation with its principal place of business in Tallahassee, Florida. Founded in 1905, FICPA is an active professional organization of approximately 18,000 Certified Public Accountants ("CPAs"), working to improve the accounting profession and to serve the public better. The FICPA is the fifth-largest state CPA organization in the United States. Its membership is comprised of practitioners in public accounting, industry, government and education. Other membership categories include associate members, retired CPAs, and CPAs domiciled outside the State of Florida.

One of the primary purposes of the FICPA is to encourage the analysis, discussion, and understanding of issues related to the accounting profession. This includes monitoring the scope of services provided by CPAs in Florida and throughout the United States, monitoring legislation affecting the practice of public accountancy, assisting in the development of auditing, accounting and ethical standards, and educating the public with regard to the responsibilities of CPAs. These areas of activity bear directly on the issues now before this Court.

FICPA was not involved in the trial of this matter, but participated in the appeal before the Eleventh Circuit Court of Appeals as Amicus Curiae in support of Petitioners. FICPA was granted consent to file a brief in this matter as Amicus Curiae in support of Petitioners by counsels for Petitioners and Respondent.

SUMMARY OF ARGUMENT

The Eleventh Circuit Court of Appeals upheld the Northern District Court of Florida's decision declaring unconstitutional Florida's prohibition on the direct, uninvited, in-person solicitation by certified public accountants ("CPAs") for remunerative employment. The Eleventh Circuit's decision is contrary to precedents of this Court and should be reversed.

In a number of decisions, this Court has consistently recognized that uninvited, in-person solicitation presents a potential for abuse that is not present in other forms of communication. Because of this potential, uninvited, in-person solicitation may actually disserve the informational function protected by the First Amendment and, as such, is an appropriate target for regulation by the states.

Enacted pursuant to its police powers, Florida's prohibition serves to maintain the standards of the accounting profession and to protect consumers from the evils of fraud, undue influence, invasion of privacy, overreaching, intimidation, and other forms of "vexatious conduct." Florida has a compelling interest in the development and regulation of its professions. The inherent inequality in the relationship between a professional and the consumer of such services creates a clear potential for abuse. Accordingly, Florida's prohibition directly furthers the State's interest, and the Eleventh Circuit erred in its analysis.

In addition, Florida's prohibition is narrowly tailored to accomplish its purposes. Because of the potential for abuse, no other regulation is available that would be as effective as

an outright prohibition. Accordingly, Florida's prohibition should be declared constitutional.

Alternatively, the Eleventh Circuit's decision should be reversed as disputed issues of fact remain, precluding the award of summary judgment in favor of Respondent.

ARGUMENT

The issues before this Court concern a state's right to regulate professions within its borders in order to maintain the ethical standards of the state's professions and in order to protect its consumers. Pursuant to its police powers, Florida has enacted a prohibition on the direct, in-person, uninvited solicitation by certified public accountants for remunerative employment.[1] The Northern District Court of Florida declared the prohibition unconstitutional, which the Eleventh Circuit affirmed, holding that Florida's prohibition did not further the State's interests and was not narrowly tailored to that interest.

The Eleventh Circuit Court of Appeal's decision is contrary to precedents of this Court, which recognize a state's interest in the regulation of its professions and in the protection of its consumers. The Eleventh Circuit Court of Appeals' decision is also contrary to a decision by Florida's Fourth District Court of Appeals issued immediately prior to

[1]This Brief is filed in support of Petitioners, Fred H. Edenfield, et al., and should be considered in conjunction with Petitioners' Brief on the Merits. In order to avoid unnecessary repetition, Amicus has not duplicated the arguments contained in Petitioners' Brief.

the Eleventh Circuit's decision, which declared the exact same prohibition constitutional. *See State of Florida v. Rampell*, 589 So. 2d 1352 (Fla. 4th DCA 1991), *appeal docketed*, no. 79,371 (Fla. February 17, 1992). If allowed to stand, the Eleventh Circuit's decision will substantially curtail Florida's and other state's attempts to regulate professions operating within their borders. Because consumers place their trust in members of professions, denying states the latitude to regulate professions will have a material and adverse impact on states and their ability to regulate professions in order to protect consumers of professional services.

I. FLORIDA'S PROHIBITION ON UNINVITED, IN-PERSON SOLICITATION BY CPAs DOES NOT VIOLATE THE FIRST AMENDMENT

Through a series of decisions, this Court has recognized that although commercial speech is entitled to some degree of protection under the First Amendment, this protection must be balanced against a state's interest in maintaining the standards of its professions and in protecting its consumers. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Peel v. Atty. Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990).

Florida has a strong state interest in the practice of accountancy and has historically subjected the practice to

regulation, pursuant to the State's police power. *See First Fla. Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990); *Heller v. Abess*, 134 Fla. 610, 184 So. 122 (1938). This Court has also recognized the strong state interest that states have in the regulation of the practice of accountancy. *See United States v. Arthur Young and Co.*, 465 U.S. 805 (1984). Florida's regulation of uninvited, in-person solicitation of new clients by CPAs was enacted by the State pursuant to its police powers in order to maintain the standards of the accounting profession and to protect consumers from the evils of fraud, undue influence, invasion of privacy, overreaching, intimidation, and other forms of "vexatious conduct."

In *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), this Court articulated a four-prong test for determining the constitutionality of governmental restrictions on commercial speech. That test requires that first, the speech at issue concern a lawful activity and not be misleading; second, the regulation must serve a substantial governmental interest; third, the regulation must directly further the asserted state interest, and finally, the regulation must be no more extensive than necessary to achieve the state's interest. *Id.* at 566.

In applying *Central Hudson*, the Eleventh Circuit Court of Appeals found that Florida's prohibition met the first and second prongs of the test, but that it failed the third and fourth prongs, *i.e.*, that the prohibition further Florida's interest and that it be no more extensive than necessary to

achieve the State's interest. The Eleventh Circuit erred both legally and factually.

A. THE PROHIBITION DIRECTLY FURTHERS FLORIDA'S INTEREST IN REGULATING CPAs.

1. The Decision is Contrary to *Ohralik v. State Bar Ass'n*

In *Ohralik v. State Bar Ass'n*, this Court upheld a prohibition similar to the one challenged here, but for direct, in-person solicitation by attorneys. Rejecting the assertion that in-person solicitation was on a par with truthful advertising, the Court found that special problems, not present with other types of advertising, arise with regard to uninvited, in-person solicitation:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision-making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.... In-person solicitation is as likely as not to discourage persons ... from engaging in a critical comparison of the "availability, nature and prices." ... [I]t actually may disserve the individual and societal interest, ... in facilitating "informed and reliable decision-making."

Ohralik, 436 U.S. at 458. These special problems arise because uninvited, in-person solicitation is "*inherently* conducive to overreaching and other forms of misconduct," and the only effective manner of regulating the potential for misconduct is through a complete prohibition of this type of solicitation. *Ohralik*, 436 U.S. at 457-58, 464 (emphasis added). Accordingly, given a state's compelling interest in maintaining standards for its professions and in preventing fraud, undue influence, intimidation, invasion of privacy, overreaching and other forms of vexatious conduct, a state may, in the limited instance of in-person solicitation, enact an outright, prophylactic ban on such communication based solely on the potential for such abuses. *Id.* at 462-66.

In *Shapero v. Kentucky Bar Ass'n*, a prohibition on direct-mail solicitation was challenged. This Court rejected the assertion that this type of solicitation presented the same potential for abuse as in-person solicitation: "face-to-face solicitation [is] a 'practice rife with the possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud'" and "unique ... difficulties ... would frustrate any attempt of in-person solicitation short of an outright ban." *Id.* at 475. Because direct-mail solicitation suffers from none of these problems, this Court struck the prohibition on direct-mail solicitation and reaffirmed its support of a prohibition on in-person solicitation.

Although this Court has been confronted with numerous forms of commercial promotion, only the abuses inherent with in-person solicitation have justified a blanket prohibition of such speech. The focus of this Court's commercial

speech decisions has been the protection of the right to disseminate information, the dissemination of which facilitates the decision-making process for consumers. *Virginia Pharmacy*, 425 U.S. at 748. Because in-person solicitation is inherently conducive to overreaching and other forms of misconduct, such solicitation does not serve the informational function protected by the First Amendment, but may actually disserve such:

> [I]n-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment .... In-person solicitation by a lawyer of remunerative employment is a *business transaction* in which speech is an essential but subordinate component. While this does not remove the speech from protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny.... [In-person solicitation] falls within the State's proper sphere of economic and professional regulation ... [and] appellant's conduct is subject to regulation in furtherance of important state interests.

Ohralik at 455, 457, 459 (emphasis added).

This Court's analysis in *Ohralik* applies equally as well to Florida's prohibition on uninvited, in-person solicitation by a CPA. Like the prohibition in *Ohralik*, uninvited, in-person solicitation by a CPA is a business transaction, and "does not stand on a par with truthful advertising about the availability and terms of the services to be provided." Here, Respondent does not seek to convey information which

cannot be delivered by any other means, but rather seeks to solicit for remunerative employment, which is nothing more than a business transaction. Such speech serves the First Amendment little, if at all, and the State may regulate such in accord with its interest in maintaining the standards of its professions in order to prevent the potential for abuse.[2] Numerous other methods are available by which Respondent could provide the information he seeks to convey, including through advertisement and direct-mail solicitation. Respondent could then solicit fully, once he has been invited.

Recent decisions have also recognized the potential for abuse inherent with in-person solicitation. In *International Society for Krishna Consciousness, Inc. v. Lee*, 60 U.S.L.W. 4749 (June 26, 1992), in-person solicitation was found to present "risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable .... The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase." *Id.* at 4753. And in *United States v. Kokinda*, 497 U.S. 720 (1990), this Court upheld a prohibition on the uninvited solicitation of funds on government property.

In both decisions, this Court recognized that the abuses inherent with in-person solicitation, along with a state's

[2]A number of other states also prohibit uninvited, in-person solicitations by CPAs. *See Fane v. Edenfield*, 945 F.2d 1514, 1516 (11th Cir. 1991). In addition, the Department of Treasury prohibits uninvited, in-person solicitation by a CPA. *See infra* at 15.

interest in managing its property, justified the burden on commercial speech. Here, the State's interest in the practice of accountancy and protecting consumers justifies the regulation.

2. The States have a Compelling Interest in their Professions, Including the Practice of Accountancy

The Eleventh Circuit erred in its understanding of the State's interest in the prohibition at issue. The Eleventh Circuit found that Florida has a strong state interest in the regulation of accountancy, but then limited the State's interest in the prohibition solely to protecting the provision of attest services by CPAs: "The Board argues that the ban is necessary to protect a CPA's integrity, independence, and objectivity while performing the attest function." *Fane*, 945 F.2d at 1517.[3] The prohibition, however, is broader than that and serves to prohibit the in-person solicitation by a CPA for all accounting services, not simply the solicitation for attest services.

Undeniably, states have a compelling interest in the development and regulation of their professions. The services of a professional differ significantly from the provision of other goods or services, including for example, the potential for confusion with regard to the nature and need for such services and the absence of a standardized

[3]Attest services refer to the issuance of an independent opinion regarding a client's financial stability in an audit or review of a client's financial statements. Only CPAs may perform this function.

product. *See, e.g., Virginia Pharmacy, supra*. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), this Court commented:

> We recognize that the States have a *compelling interest* in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."

Id., 421 U.S. at 792 (emphasis added)(citations omitted). *See also Ohralik, supra*, (state bears special responsibility for maintaining standards among its professions). Further,

> [A]dvertising by professions poses special risks of deception ... 'because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.'

In re R.M.J., 455 U.S. 191; 200 (1982) (citations omitted).

Characteristics common to all professions include: (1) the requirement of extensive learning and training; (2) a code of ethics imposing standards above those normally tolerated in the marketplace; (3) a disciplinary system for members who breach this code; (4) a primary emphasis on social responsibility over individual gain, and the corresponding duty of its members to behave as members of a disciplined and honorable profession; and (5) the prerequisite of

a license prior to admission to practice. *Lincoln Rochester Trust Co. v. Freeman*, 355 N.Y.S.2d 336, 339 (1974).

The practice of accountancy is today accepted as a profession. *Fane*, 945 F.2d at 1520. *See also Pierce v. A.A.L.L.* Insurance Co., 531 So. 2d 84 (Fla. 1988). CPAs in Florida are subject to licensure and must complete advanced educational requirements above and beyond that established for a baccalaureate degree in order to be considered for admission to practice in the State. In addition, CPAs must pass a CPA examination and a character and fitness examination, much like an attorney. Once admitted to practice, CPAs are governed and controlled by Chapter 473, Florida Statutes, and the rules adopted by the Florida Board of Accountancy, which incorporate a code of ethics.[4] Failure to adhere to the State's requirements may subject the CPA to disciplinary proceedings. § 473.323(1), Fla. Stat. In addition, CPAs must continue their education after admission through continuing education requirements. § 473.312, Fla. Stat. Today, Florida properly considers the practice of accountancy a profession and has a compelling interest in it, along with its other professions, for a number of reasons.

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[4]Those regulations incorporate ethical and fiduciary standards in the provision of professional accounting services comparable to those required for lawyers. § 473.301, Fla. Stat. (1991). Like an attorney, the regulations extend to all accounting services a CPA provides, not just those services which only a CPA may provide, such as attest services.

First, members of professions, because of their education and training, possess specialized knowledge which the ordinary consumer is unable to acquire themselves, without great difficulty. Second, the person seeking advice is often in great need of the professional's assistance and is dependent upon the professional providing the assistance. Third, because of the inherent inequality in the relationship, the consumer is ill-equipped to evaluate the professional's competence and must place his trust in the professional. And fourth, the professional is not an island unto himself, but is part of a professional community which lends credence and identity to the professional, further supporting the inequality of the relationship. Because this inherent inequality is common to all professions, the State, today and historically, has a legitimate concern that a professional will use this specialized knowledge to the disadvantage of the consumer.

The disparity between professionals and others forms the basis for such prohibition, not only as to lawyers but also as to doctors, CPAs, psychiatrists, and other professions. Numerous states have enacted prohibitions on uninvited, in-person solicitation and include, for example, statutory prohibitions against the uninvited solicitation by optometrists,[5] health care professionals,[6] and dentists.[7]

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[5]*See, e.g.*, Del. Code Ann. tit. 24, § 2113(7)(f)(1987); Minn. Stat. Ann. § 148.57 (West 1989).

[6]*See, e.g.*, Ky. Rev. Stat. Ann. § 438.065 (Michiel Bobbs-Merrill 1985); La. Rev. Stat. Ann § 37:1743 (West Supp. 1992).

Furthermore, an overwhelming number of states prohibit a professional from utilizing a solicitor to solicit employment.[8]

Like attorneys, CPAs acquire knowledge and expertise indispensable in today's society but which even the most sophisticated lay person would find confusing. Although this circumstance does not mean that CPAs will take advantage of a client, it is the *possibility* that CPAs might use their specialized knowledge to solicit a potential client that justifies the State's interest in the communication and the regulation of this communication.[9]

In his dissent to the Eleventh Circuit's decision in this case, Judge Edmonson correctly found that the practice of accountancy, like the practice of law, is a highly-skilled and technical profession in which years of education and training are necessary. The potential for confusion as to the nature

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[7]*See, e.g.*, Minn. Stat. Ann. § 150A.11 (West 1989); Mont. Code Ann. § 37-4-502 (1991); S.C. Code Ann. § 40-15-190(17) (Law. Co-op. Supp. 1990).

[8]*See, e.g.*, Ariz. Rev. Stat. Ann. § 32-854.01(6) (1986 & Supp. 1992) (podiatry); Cal. Bus & Prof. Codes § 2273 (West 1990 & Supp. 1992) (physician); Colo. Rev. Stat. Ann. § 12-35-118(1)(s) (1991) (dentist); Haw. Rev. Stat. § 453-8(a)(2) (1985 & Supp. 1989) (physician); Md. Health Occ. Code Ann. § 14-404(a)(14) (1991 & Supp. 1991) (same); S.C. Code Ann. § 40-55-150(14) (Law. Co-op. 1986 & Supp. 1990) (psychologists).

[9]Proof of actual harm is not required; rather, a state may prohibit such solicitation based on the potential for misconduct. *Ohralik*, 436 U.S. at 466-67; *Shapero*, 486 U.S. at 472; *In re Primus*, 436 U.S. 412 (1978)(showing of potential danger sufficient). Because in-person solicitation is inherently conducive to abuse, that potential exists for attorneys and other professions, including CPAs.

and need for such services by laymen is as great for accounting services as it is for legal services. Indeed, the services provided by CPAs and attorneys are, in certain situations, identical. For example, in the area of tax practice, both tax attorneys and CPAs may provide identical tax-related services and the reasons that support a prohibition against in-person solicitation by attorneys in these situations apply equally to CPAs. In these instances, the prohibition of uninvited, in-person solicitation of prospective clients serves precisely the same function. There is no rational distinction between permitting a state to prohibit attorneys from in-person solicitation of prospective tax clients but to hold a similar prohibition of in-person solicitation by CPAs for the same services unconstitutional.

The Eleventh Circuit's decision is also contrary to a decision issued three weeks prior to the Eleventh Circuit's decision by Florida's Fourth District Court of Appeals in *State of Florida v. Rampell*, declaring the same prohibition constitutional, and specifically finding that the State's interest in regulating in-person solicitation is a result of the profession's specialized knowledge and the inherently coercive nature of such communications:

> Whether the solicitation is by a lawyer or a CPA, pressure can be exerted on a potential client to make a hasty and uninformed decision. While CPAs may not be trained in the art of persuasion, they are trained in the intricacies of taxes and financial statements which even the most sophisticated lay person finds confusing. We are not so naive as to think that all CPAs would never take advantage of a client if allowed to personally solicit the client, any

> more than we think that all lawyers are "bad apples" who exploit every prospective client. It is the possibility of harmful solicitation and the knowledge of that -- whether by the door-to-door salesman, the attorney, or the CPA -- all in-person solicitation is particularly susceptible to abuse which allows the State to regulate such conduct.

Id. at 1357.

Respondent erroneously suggests that the State of Florida is isolated in its prohibition on in-person solicitation. As the Eleventh Circuit found, a number of other states, by statute or regulation, have enacted similar prohibitions. *See also supra* at 12. In addition, the Department of Treasury has also enacted a similar prohibition with regard to CPAs, attorneys, and enrolled agents practicing before the Internal Revenue Service and the Bureau of Alcohol, Tobacco, and Firearms. *See* 31 C.F.R. §§ 8.41 and 10.30. CPAs in every state are subject to the Department of Treasury's prohibitions when practicing before these federal agencies. When it was suggested to the Department that these prohibitions were unnecessary in light of *Ohralik*, the Department disagreed:

> The Department believes that the complexity of our tax laws and the anxiety which many taxpayers feel when confronted with matters such as examination of tax returns, imposition of tax liens and estate tax issues for bereaved family members of decedents indicate that, at this stage of our experience, limitations be placed on in-person solicitation. Hence to avoid the opportunity for overreaching, the invasion of a taxpayer's privacy and situations where the judgment of the practitioner on behalf of the client may be clouded by his own pecuniary self-interest,

> the prohibition on in-person solicitation is continued in the final regulations.

44 Fed. Reg. 17 (Jan. 1979).

Restrictions on in-person solicitation act as concrete, day-to-day reminders to the practicing CPA of why it is improper for any member of this profession to be regarded as a trade or occupation. This Court has recognized that the professions have been well served by the implementation of codes of ethics imposing certain standards beyond that prevailing in the market place. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 676-77 (1985); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975); *Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232, 247 (1957). This push for higher standards inures to the benefit of the State and its citizens, who knowingly or unknowingly, rely on the higher ethical standards for protection. The State clearly has a compelling interest in ensuring that natural forces do not conspire to transform its professions, including the practice of accountancy, into crafts or businesses.[10]

Ensuring that members of a profession place social responsibility above pecuniary gain, however, is a relentless struggle against the natural forces of economic self-interest.

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[10]The ability of a profession to impose standards on itself, however, is restricted. For example, in this case, the national organization for accountancy, American Institute of Certified Public Accountants, had enacted a prohibition on in-person solicitation but removed the prohibition after antitrust concerns were raised. Such concerns do not exist where the State imposes the standards.

As Justice O'Connor has stated, sermonizing alone will not provide these standards:

> One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market.

Shapero, 486 U.S. at 488-90. To deny states the latitude to enact prohibitions on such communications is to deny states the right to protect their citizens.

The Eleventh Circuit, however, ignored the State's concerns regarding professions, finding that "*other financial professionals,* such as non-certified accountants, bookkeepers, and tax preparers are not prohibited from utilizing personal contacts to solicit new clients." *Fane,* 945 F.2d at 1516 (emphasis added). The Eleventh Circuit erred in its understanding of the State's interest in regulating CPAs. Unlike CPAs, the other occupations are not considered professions and cannot hold themselves out as possessing the qualifications and skills that the title "CPA" provides. Because of the inherent inequality in the relationship between a professional and consumers, consumers must place their trust in professions, and it is not unreasonable for the State to condition its grant of special privilege and standing upon the acceptance of additional restraints.

3. The Eleventh Circuit Erred in Limiting *Ohralik* to those Professions Involving a Trained Advocate or to the Solicitation of the Emotionally Vulnerable.

The Eleventh Circuit also justified its refusal to apply *Ohralik* by asserting that *Ohralik* should be limited to those professions involving a "trained advocate," or to the solicitation of the "emotionally vulnerable." *Fane*, 945 F.2d at 1520. Nothing in *Ohralik*, or subsequent decisions which have cited to *Ohralik*, suggests that *Ohralik* should be so limited. Indeed, *Shapero* specifically rejected the premise that emotional vulnerability provides the predicate for imposition of a prohibition on solicitation, holding: "The relevant inquiry is not whether there exists potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptible belief." 486 U.S. at 474. Clearly, the prohibition approved in *Ohralik* applies not only to the solicitation of the emotionally vulnerable, but also to the solicitation of prosperous business clients, knowledgeable about financial matters and the provision of professional services. Absolutely no justification exists for the Eleventh Circuit to limit *Ohralik* to solicitation of the emotionally vulnerable.

Furthermore, although this Court has cited a lawyer's advocacy skills in its decisions, it has never indicated that this was the basis for its decisions. Rather, the focus of this Court's decisions has been upon the mode of communication and the potential for abuse. *See Shapero; Ohralik; Kokinda; Int'l Society for Krishna Consciousness, Inc.* This

potential exists whenever a professional uses his specialized knowledge to solicit in-person a potential client. To forbid a state from seeking to regulate such communications, except as to attorneys, adversely affects the state's ability to protect its consumers and effectively limits prohibitions of in-person solicitation to attorneys, funeral salesmen, and used car salesmen. *Fane*, 945 F.2d at 1520.

Moreover, contrary to the lower court's findings, there are instances where potential clients for accounting services are as susceptible to improper solicitation as personal injury victims. Such instances include, for example, taxpayers appearing before the I.R.S. For many taxpayers, that examination can be emotionally disconcerting, making the taxpayer susceptible to solicitation. Similarly, with regard to the provision of attest services, certain entities subject to regulatory action (*e.g.*, a savings and loan bank) or under threat of bankruptcy would also be susceptible to improper solicitation. Such an entity would be under immense pressure to present its financial information in a positive, unqualified manner. Undue influence, overreaching, and fraud are valid concerns in these instances. Indeed, Respondent acknowledges this potential in his Supplemental Affidavit where he admits that financial pressures might force a company to seek "to bend the rules" in order to obtain a "'clean' financial opinion." Supplemental Affidavit of Scott Fane at 4. In these instances, the State's concerns are just as great as they are for personal injury victims.

B. THE PROHIBITION IS NARROWLY TAILORED TO THE STATE'S INTEREST.

The Eleventh Circuit also erred in concluding that Florida's prohibition is more extensive than necessary to achieve the State's interest. The prohibition limits only the uninvited, in-person solicitation by the CPA. The prohibition does not prevent advertisement or targeted, direct mail solicitation of clients by CPAs. Respondent is free to identify prospective customers and target those clients for direct mail solicitation. He is prohibited only from initiating these acts by telephone or in person without invitation from the prospective client.

The Eleventh Circuit, however, as indicated above, failed to recognize that the State's interest in the prohibition runs to the entire practice of accountancy, and not simply the provision of attest services. On this error alone, the Eleventh Circuit struck the prohibition, believing it to be more extensive than necessary: "CPAs who specialize in many aspects of the accounting profession have no occasion to attest to the accuracy of audits or financial statements. If allowed at all, Florida's Statute must be narrowly tailored to achieve its anticipated objective." *Fane,* 945 F.2d at 1518.

The Eleventh Circuit also erred in holding that other regulatory requirements exist that can be utilized. As this Court found in *Ohralik* and *Shapero*, however, because of the special problems with in-person solicitation, no other effective regulation exists except an outright prophylactic ban. *Ohralik*, 436 U.S. at 466-67; *Shapero*, 486 U.S. at 473 (the "unique" regulatory problems of in-person solicitation justify a complete ban). Indeed, the regulatory requirements suggested by the Eleventh Circuit, requirements that the CPA be independent and not engage in any fraudulent or deceptive activity, along with the existence of tort liability, also exist with regard to attorneys. But these alternatives may only be utilized on an after-the-fact basis, based upon subsequent discovery of the misconduct. The State has a compelling interest in preventing such misconduct from occurring, which permits the State to apply remedies before the fact. No effective pre-screening mechanism, such as that approved in *Zauderer* for advertising, is available for in-person solicitation. As such, the prohibition passes the fourth prong of *Central Hudson* and should be declared constitutional.

II. SUMMARY JUDGMENT WAS NOT APPROPRIATE.

Alternatively, the Eleventh Circuit Court of Appeals erred as disputed issues of material fact remain, precluding the entry of summary judgment in favor of Respondent and requiring that the action be remanded to the lower court. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

In determining whether disputed issues of fact remain, the lower court must review the evidence in the light most favorable to Petitioners, accepting as true the evidence introduced by Petitioners. All reasonable doubts are to be resolved in favor of Petitioners. *Adickes,* 398 U.S. at 157.

Petitioners introduced the Affidavit of Louis Dooner, past chairman of the Florida Board of Accountancy, and an expert

in the field of accountancy. That Affidavit demonstrates the legitimate purpose and need for the regulation. *See* Affidavit of Dooner. In that Affidavit, Mr. Dooner avers that such regulation is necessary to preserve the integrity and independence of auditing services and to prevent improper conduct. *See also* Supplemental Affidavit of Scott Fane, at 4. These statements must be taken as true.

In addition, the Northern District Court made a number of findings, which were adopted by the Eleventh Circuit, that are not supported by the record, or, at the least, resolve disputed issues of fact. These include the court's findings that CPAs are not "coercive, persuasive, or ... [able to] take particular advantage of a face-to-face situation" (Order at 7); that the dangers associated with in-person solicitation by attorneys do not exist with regard to CPAs (Order at 7); that business clients of CPAs, based upon their knowledge, are in a significantly different position than clients of attorneys (Order at 8); and that other regulatory requirements exist which can be utilized to prevent the misconduct (Order at 12). These findings establish disputed issues of material facts which cannot be resolved by summary judgment.

By contrast, judgment in favor of Petitioners is appropriate. Statutes are presumed constitutional, and if any state of facts exists to support the challenged statute, the statute must be upheld. As set forth above, because Florida has a clear and compelling interest in the prohibition, which prohibition is narrowly tailored to the evil sought to be remedied, judgment in favor of Petitioners is appropriate.

CONCLUSION

For the foregoing reasons, Florida's prohibition on uninvited, in-person solicitation should be declared constitutional, or alternatively, the Eleventh Circuit's decision should be reversed and remanded for a trial as disputed issues of fact remain.

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FRED H. EDENFIELD, *et al.*,
Petitioners,

v.

SCOTT FANE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, ASSOCIATION OF NATIONAL ADVERTISERS, INC., DIRECT MARKETING ASSOCIATION, INC. AND OLAN MILLS INC. IN SUPPORT OF RESPONDENT

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Florida's total ban of all oral cold-call solicitation by accountants impermissibly prohibits lawful and truthful commercial speech and is unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States. The decision of the United States Court of Appeals for the Eleventh Circuit invalidating the ban should be affirmed.[1]

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[1] Both parties have consented to the participation of *amici* in this case pursuant to Supreme Court Rule 37, as evidenced in letters filed with the Court.

INTEREST OF AMICI CURIAE

Amici represent thousands of advertising agencies, advertisers, broadcasters, publishers, photographers, and others who participate in the telemarketing industry nationwide. They have joined in this brief to protect the right to disseminate, and the public's right to receive, truthful commercial speech about lawful products and services. *Amici*, who are described below, are the American Advertising Federation ("AAF"), the Association of National Advertisers, Inc. ("A.N.A."), the Direct Marketing Association, Inc. ("DMA"), and Olan Mills, Inc. ("Olan Mills").

- The AAF is a national trade association representing virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use almost all forms of media to advertise and communicate with consumers throughout the United States.

- The A.N.A. is the advertising industry's oldest trade association. It is exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions, and operating units, A.N.A. members market a wide array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. A.N.A. has long been committed to the advancement of commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

- The DMA, a non-profit corporation, is the oldest and largest trade association serving the vast community

of direct-to-the-consumer advertising and marketing. Its members are firms engaged in or associated with marketing goods and services through direct response methods, which includes the use of catalogs and other printed materials distributed directly to consumers. Many DMA members contact their customers via telephone.

- Olan Mills is a privately held company operating more than 900 photograph studios nationwide engaged in making family portraits. It employs about 16,000 people. The company was founded in Alabama in 1932 and originally conducted its business through the use of door-to-door solicitations. In 1948 Olan Mills began shifting to the use of telephone solicitation. The telephone line is now the spinal cord of Olan Mills' business in terms of acquiring and retaining customers. Virtually all of its hundreds of thousands of customers, many of whom deal with it repeatedly, are contacted initially through demographically targeted telephone "cold-calls."

SUMMARY OF ARGUMENT

Florida claims that "cold-call" solicitations—whether in-person or over the telephone—by certified public accountants are so inherently conducive to fraud and damaging to the public's regard for CPAs that they may be categorically banned regardless of the identity of the recipient, the truthfulness of the message, or the lawfulness of the service being offered. Significantly, Florida makes no serious effort to show that solicitations by accountants, typically directed toward business people in a business setting, threaten to invade the privacy of people in their homes. Nor does Florida claim that CPA telephone solicitations, which the recipient can end with the press of a button, are unduly intrusive.

Primarily, Florida seeks to justify this ban by relying on its authority to regulate professions within its borders. In defending the restriction, however, the state makes broad, unnecessary, and unsubstantiated contentions

about oral cold-call solicitations generally. The state goes too far; its power to govern professional speech is subject to the First Amendment.

Oral communication between two people, whether in-person or over the telephone, is constitutionally protected "speech." Truthful communications soliciting purchases of lawful goods and services remain protected speech, and attempts to restrict such speech must satisfy the four-part, multi-factor balancing test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The Eleventh Circuit correctly held that Florida's attempt to ban completely cold-call solicitations by accountants is invalid under this *Central Hudson* test. In particular, the Court of Appeals correctly found that the State has failed to demonstrate a "reasonable fit" between its purported goals of preventing fraud and overreaching by accountants and the means it has employed to achieve that goal. This lack of "fit" is even more pronounced as to telephone solicitations which: (1) can be readily terminated by the recipient; (2) lack the unique features of in-person solicitation deemed problematic by the Court in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); and (3) have been subjected to Florida's ban only by the administrative interpretation of the Florida Board of Public Accountancy (the "Board").

This Court, however, should not perpetuate the confusing *Central Hudson* balancing test, which lacks both textual and historical support. Instead, the Court should make clear that truthful speech about lawful products and services is entitled to the full measure of constitutional protection. This approach would be: (1) fully consonant with the original understanding of the First Amendment, as reflected in its text and surrounding historical circumstances; and (2) consistent with the *outcome* of every Supreme Court case involving such speech since it decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council*, 425 U.S. 748 (1976), with a single aberrant exception. The resulting

legal standard would be more faithful to the original meaning and text of the Constitution, far less confusing, more conducive to principled decision-making, and less subject to abuse.

Even if this Court disagrees with *amici* and finds this bar justified due to features unique to the accounting profession, *amici* urge the Court to reject summarily the sweeping theory of the Petitioner's brief. In particular, *amici* ask that this Court refuse Florida's invitation to make broad statements about the nature of commercial solicitation—especially via telephone—which could be seized upon by over-zealous regulators to impose wide-ranging bans on such solicitation generally.

ARGUMENT

I. THE BAN ON ORAL COLD-CALL SOLICITATION BY ACCOUNTANTS DOES NOT SATISFY THE *CENTRAL HUDSON* TEST BECAUSE IT DOES NOT DIRECTLY ADVANCE THE STATE'S INTEREST NOR IS IT "NARROWLY TAILORED TO ACHIEVE THE DESIRED OBJECTIVE."

"[T]he free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system." *Virginia Board of Pharmacy*, 425 U.S. at 765 (citations omitted). The First Amendment's free speech guarantee protects that indispensable free flow of commercial information. *Id.*; *Central Hudson*, 447 U.S. at 561-62. This constitutional protection extends to attempts to contact listeners as well. As the Court has said, "The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to reach their attention.'" *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (quoting *Kovacs v Cooper*, 336 U.S. 77, 87 (1949)). Similarly, the First Amendment safeguards the right of listeners to receive commercial information. *Linmark Associates, Inc. v.*

Township of Willingboro, 431 U.S. 85, 96 (1977) (restriction on speech impermissibly "prevent[ed] [people] from obtaining certain information.").[2]

First Amendment protections extend to all forms of oral communications between people, whether in person or by telephone. *See, e.g., Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989). Indeed, Florida's brief and its challenged regulations treat telephone conversations as "in person" speech.

This Court has held that, at minimum, a state seeking to restrict speech proposing a commercial transaction must prove that the restriction "*directly* advances" a "*substantial*" interest, and is "*narrowly* tailored" to achieve a reasonable "fit" between the legislature's ends and means. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (emphasis added). The Court must be persuaded that "the cost [has been] carefully calculated" and is justified. *Id.*[3]

In Part I *amici* show that, under the standards of *Central Hudson*, Florida's ban on accountant cold-calling must fall. However, in Part II *amici* urge the Court not to rest on the textually and historically unsupported *Central Hudson* test but, instead, to recognize that truthful speech about lawful products and services is entitled to full First Amendment protection.

[2] *See also, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Commercial speech is intensely concerned with the instrumental interest of hearers in receiving information that enhances the capacity for informed choice. As this Court has noted, consumer interest in commercial information "may be as keen, if not keener by far, than . . . interest in the day's most urgent political debate." *Virginia Board of Pharmacy*, 425 U.S. at 763.

[3] *Fox* is clear that the "burden of justifying its restrictions" is on the State. 492 U.S. at 480. The courts will not rely on assumptions, or even "legislative determination[s]," but will "go behind" them to assess the factual evidence. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). Where, as here, the restriction at issue obviously tends to favor entrenched economic interests by suppressing the speech of emerging competitors, the Court should be particularly careful to assure that proffered justifications are genuine and substantial.

A. Outright Bans on Communication for Prophylatic Purposes Are Particularly Suspect.

The key requirement of the *Central Hudson* test that any governmental restriction on commercial speech directly advance a substantial interest in a narrowly tailored manner places an especially heavy burden on the state to justify a total prohibition on such speech. Yet Florida here is defending a statute and implementing regulations that absolutely forbid an accountant to speak first to a stranger (in person or by telephone) to propose CPA services. Florida's stated objection is not to accountants obtaining new clients; indeed, the ban does not forbid an accountant to seek new clients through other means, including many that carry equal or greater risk of fraud. Instead Florida objects to every form of direct speech, the so-called "cold-call solicitation," defined by its content, and subjects that speech to an absolute ban. This Court's jurisprudence makes plain that flat bans on communication are inappropriate, unless the state can demonstrate that only such a ban can achieve its substantial goals.

In a variety of contexts involving speech, the Court has said that "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone. . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted).[4] Thus, the government may not "place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in an way that is not deceptive." *In re R.M.J.*, 455 U.S. 191, 203 (1982) (over-

[4] *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (holding that ordinance prohibiting door-to-door solicitation by charities failing to meet certain requirements was broader than necessary to prevent fraud).

turning Missouri's attempt to prohibit certain types of solicitation completely based on their "potentially misleading" nature). Nor may the state ban a particular mode of communication, defined entirely by content. *Linmark Associates, Inc.*, 431 U.S. at 93-95.

As *In re R.M.J.* illustrates, these principles unquestionably apply to commercial speech.[5] In fact, even "isolated abuses or mistakes cannot justify a total ban on [a] mode of protected commercial speech." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988).[6]

To overcome this robust tradition of rejecting absolute prophylactic bans on speech, Florida rests almost entirely on *Ohralik*, 436 U.S. 447—a clearly distinguishable case. *Ohralik* involved a lawyer who, despite being initially rebuffed, bullied two injured and bedridden patients into

[5] *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643 (1985) ("The state's argument that it may apply a prophylactic rule to punish appellant [for his commercial communication] notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the state's purposes."); *Virginia Board of Pharmacy*, 425 U.S. at 748 (holding unconstitutional blanket ban on drug advertising because it was more intrusive than necessary to prevent fraud and abuse); *Bates v. State Bar*, 433 U.S. 350, 384 (1977) (invalidating restriction on advertising by attorneys on grounds that other, more focused restrictions could serve state's interests).

[6] Although *Fox*, 492 U.S. 469, upheld a restriction on the sale of Tupperware in dormitories, it is perhaps best understood—and perhaps should have been analyzed—as a right of access case involving a rule of general applicability affecting many business activities in addition to commercial speech. *See International Society for Krishna Consciousness*, 452 U.S. at 654 (state fair may require that sale or distribution of any merchandise on state fair grounds be licensed). Unlike Florida's law, the general ban on most commercial activities on campuses at issue in *Fox* did not directly discriminate against certain forms of speech. Rather, its broad purpose was to keep businesses out of university campus dormitories.

allowing him to represent them. He later refused to relinquish the representation when the solicited parties tried to revoke their consent. What was "objectionable about Ohralik's behavior . . . [was] not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it." *Id.* at 470 (Marshall, J., concurring in part and concurring in judgment).[7]

In addition, the *Ohralik* decision is inextricably linked to what this Court has identified as the unique status of lawyers and the heightened demands of the legal profession. *Shapero*, 486 U.S. at 476 (referring to the regulatory difficulties unique to lawyers); *see also id.* at 490 (O'Connor, J., dissenting).[8] What is true for lawyers—who are specifically trained to persuade—is not true for accountants. As the Court of Appeals said, "[s]olicitation by a CPA does not entail the 'coercive force of the personal presence of a tailored advocate.'" *Fane v. Edenfield*, 945 F.2d 1514, 1520 (11th Cir. 1991)

[7] *Ohralik* therefore establishes the unexceptionable proposition that the government may prohibit oppressive conduct that actually occurs. It does not demonstrate that the state may impose a wide-ranging prophylactic ban to guard against conduct which might perhaps take place.

[8] While some of the *amici* question the extent to which even this rationale justifies the restrictions on advertising by lawyers which this Court has upheld, the differences between accountants and their clients, on the one hand, and lawyers and their clients, on the other, mean that the Court need not face this issue. Moreover, *amici* recognize that there are disagreements among the members of this Court concerning the degree of regulation states may impose on professions and the interest that may justify such regulation. *Compare, e.g., Shapero*, 486 U.S. at 479 *with id.* at 487 (O'Connor, J., dissenting). However the Court may ultimately decide that issue, the interests of the states in regulating the practice of professions within their borders is plainly different from—and more substantial than—its interest in restricting protected communications of advertisers and marketers of generally available products and services.

(quoting *Zauderer*, 471 U.S. at 642) [hereinafter "Court of Appeals op."].[9]

The Court therefore should adhere to its tradition of rejecting prophylactic bans on speech and reject Florida's overly broad reading of *Ohralik*.

B. Florida's Speculative Justifications Do Not Withstand Any Level of First Amendment Scrutiny.

The ban is unsupportable even if this Court were to look beyond its strong presumption against flat bans on speech. Once the plaintiff moved for summary judgment, Florida was required to adduce evidence to support its undisputed prohibition of speech. Fed. R. Civ. P. 56(e); *Celotex v. Catrett*, 477 U.S. 317 (1986); *see Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 543 (1980) ("Mere speculation of harm does not constitute a compelling state interest."). Florida did not offer any such evidence, and the speculative justifications that it proffered do not withstand scrutiny under *Central Hudson*. In any event, Florida has failed to prove that the bar is narrowly tailored to achieve substantial objectives or that the benefits gained, if any, justify the costs. *Fox*, 492 U.S. at 480.

1. *The Ban Is Not Narrowly Tailored To Directly Advance the State's Interest.*

Florida's ban is not defined in terms of, and is not intended to protect, any uniquely vulnerable class of recipients.[10] Instead, Florida's brief asserts that the

[9] Of course, it is absurd to assert that professionals have a special proclivity to dishonesty. This is true even of lawyers.

[10] As the District Court said, "[CPAs] prefer to solicit prosperous business people as potential clients. These people tend to be knowledgeable about financial matters and successful enough to require specialized accounting services: they know what they need and whether the accountant can fulfill this need." *Fane v. Edenfield*, No. TCA 88-4026MMP, slip op. at 7-8 (N.D. Fla. Sept. 13, 1991) [hereinafter "Dist. Ct. op."]; *see also* Court of Appeals op. at 1520. The CPA's audience is therefore often different from that of the lawyer soliciting a potential client who may well be in *extremis*, emotionally or physically. *Compare Ohralik*, 436 U.S. 447.

nature of a cold-call itself, regardless of the recipient, tends to promote "fraud, overreaching, [and] misrepresentation" in a way that only a ban can correct.[11]

None of Florida's proffered justifications establish any reason why cold-call solicitation is uniquely likely to lead to fraud. The temptations to fraud that Florida discusses are just as great if a potential customer calls the accountant in response to a flyer, television ad, or telephone book listing, or if the contact occurs in some other way. Indeed, one might suspect that the temptations are even greater when an accountant is seeking to retain an existing client, yet such speech is not forbidden. Thus, the Court of Appeals correctly observed that "[n]owhere in the record . . . do we find . . . any evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation." Court of Appeals op. at 1518.[12]

[11] Brief for Petitioner at 24, *Edenfield v. Fane*, No. 91-1594 (U.S. July 24, 1992). Significantly, the state does not seriously attempt to justify its ban here on any infringement on the privacy of the home. Nor could it, for accountants—particularly those offering to perform the "attest" function—would primarily call upon potential customers at their place of business. *See* Dist. Ct. op. at 8 ("[T]he solicitation [by an accountant] usually takes place in a business setting, a place where the potential client will not feel intimidated."). Thus, Florida's law "is not directed to the unique privacy interests of persons residing in their homes because it applies not only to door-to-door solicitation," but to all forms of oral cold-call solicitation. *Village of Schaumburg*, 444 U.S. at 638-39.

[12] Florida's ban is thus wholly different from the law upheld in *Friedman v. Rogers*, 440 U.S. 1 (1979). *Friedman* makes clear that the "falsity rationale" may only be employed to justify a limitation on commercial speech where the legislature's concerns are "not speculative or hypothetical, but were based on experience." *Id.* at 13.

While Florida asserts that oral cold-calls are ephemeral, and hence "essentially unregulatable," that is no more true for cold-calls than for other types of oral communication by accountants. Thus, this consideration also fails to justify the cold-calling ban.

Finally, Florida says that public knowledge that some accountants are seeking new business through cold-calling will create a public "perception" that will "debase" the profession's public reputation and impair its "attest" function. The state's theory is that, if the public learns that CPAs are making cold-calls, it will infer that accountants are so pressed to obtain new business that they will be willing to "bend the rules." Petition for Writ of Certiorari at 21, *Edenfield v. Fane*, No. 91-1594 (U.S. Mar. 30, 1992). The argument is wholly specious, as it rests on the belief that cold-calling signals a need for business and that a need for business signals a willingness to commit fraud. Even if that were true, the cold-calling ban does not eliminate the accountant's desire for new business.[13] Instead, by hypothesis, it prevents the public from learning the "truth" and, hence, forming an accurate judgment about the profession and the effectiveness of the state's regulation thereof. In short, this is a claim that truthful speech may be banned so that the state may deceive the public.[14]

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[13] In light of the protectionist nature of this restriction, it is unsurprising that the only *amicus* supporting the state is the Florida Institute of Certified Public Accountants, which represents the more entrenched elements of the accounting industry.

[14] This Court has made clear that a state may not use an advertising ban to protect the ethical or performance standard of a profession. *Central Hudson*, 447 U.S. at 770. There are far more direct ways to police the accounting profession than to prohibit all oral cold-call solicitations by CPAs, good or bad. *See, e.g., Bates*, 433 U.S. at 368 (invalidating ban on advertising by lawyers despite contention that such a restriction was justified by the need to protect "the client's trust in his attorney.").

2. *The State Has Failed To Demonstrate That the Benefits of Its Restriction Outweigh the Costs of the Ban.*

In addition to the ban being insufficiently narrowly tailored, the ban's cost clearly is not "in proportion to the interest served." *Fox*, 492 U.S. at 480. For many purposes mass communications advertising is not a substitute for the direct, person-to-person conversations that are banned by the Florida law. Oral solicitation allows sellers to contact, directly and in a most efficient manner, only those consumers whom they have reason to believe are interested in their product. Direct oral communication also allows for an exchange during which the speaker can address particular concerns and questions communicated by the listener. Restricting oral cold-call solicitations therefore trenches upon the constitutional rights of both the speaker and the receiver. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").[15]

The ban also "increas[es] the difficulty of discovering the lowest seller of acceptable ability," thereby reducing "the incentive to price competitively." *Bates*, 433 U.S. at 377 (one benefit of price advertising is that it leads to "often . . . dramatically lower" retail prices). It serves "to perpetuate the market position of established [firms]." *Id.* at 378. Thus, Florida's bar on solicitation will function as a barrier to entry that benefits those accounting firms with a strong established client base and hobbles

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[15] The fact the Florida law permits accountants to solicit those who have indicated their consent to such a communication does not vitiate the violation of the right to receive information. "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring).

those that are struggling to form such relationships. Such a blatantly anticompetitive measure provides a sorely inadequate basis for repressing constitutionally protected speech.[16]

C. A Ban On Oral Cold-Call Solicitation by Telephone Is Especially Unjustifiable.

Importantly, although Florida's legislature has chosen to ban only "in-person" solicitation, the Board has, with no apparent justification, extended that prohibition to telephone communications as well.[17] The fact that Florida's law, coupled with its implementing regulations, prohibits both in-person and telephone solicitation alike is an additional reason to find the statute and those regulations unconstitutionally over-inclusive and irrational.

[16] If endorsed by this Court, the principle underlying the ban might easily be used to justify similar restrictions on other licensed, regulated occupations not now classified as "professions."

[17] *See* Fla. Stat. Ann. § 473.323(1)(*l*) (West 1991) (making *only* "direct, *in person*, uninvited solicitation of a specific potential client" grounds for disciplinary action) (emphasis added). Of course, the Court has long held that the government may bar commercial messages addressed to an individual who has previously indicated his or her desire to be free of such appeals. *See, e.g., Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970) ("Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit"). To accommodate the interests of individuals who do not wish to be solicited, Olan Mills has, for example, instituted a "do not call" system. The name of every individual who informs an Olan Mills employee that he or she does not wish to be called is placed on a list retained by the company. That person is not contacted for at least two years. Pursuant to the Telephone Consumer Protection Act of 1991, the Federal Communications Commission is currently formulating rules to govern telemarketing and, as part of that proceeding, the FCC is considering whether to adopt such a company-specific "do-not-call" requirement. *Telephone Consumer Protection Act of 1991*, News Release Rept. No. DC-2092, CC Docket No. 92-90 (FCC Apr. 16, 1992).

Telemarketing is simply not inherently fraudulent or coercive.[18]

When applied to telephone solicitation, Florida's reliance on the restrictions on in-person communication upheld in *Ohralik* becomes even more attenuated. *Ohralik* was limited to "in-person" (436 U.S. at 449) and "face-to-face" (*id.* at 464) communication, where the potential for coercion is more substantial than in a telephone contact. Likewise, the *Shapero* case refers to the "*personal presence* of a *trained advocate*," 486 U.S. at 475 (quoting *Zauderer*, 471 U.S. at 642), who could "grasp [the consumer] by the lapels" in a "face-to-face" setting, *id.* at 479 (quoting Brief for Respondent at 20, *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 481 (1988)).[19] These cases are inapplicable to telemarketing in which the consumer's lapels are, by definition, out of reach, contracts cannot be signed, and a natural 'cooling off" period exists between the time of the "pitch" and the execution of any written agreement.

Telemarketing is therefore analogous to the targeted mailing approved in *Shapero*. Like targeted mailing, the content of telemarketing messages can be verified.[20] Also,

[18] In fact, Florida law permits telemarketers of all kinds to call consumers at home unless a consumer affirmatively requests and pays for a special designation in the phone book indicating that such person does not want to be contacted by cold-callers. Fla. Stat. Ann. § 501.059(3) & (4) (West 1991).

[19] In describing the holding of *Ohralik*, this Court said that "[the] *unique features of in-person* solicitation *by lawyers* . . . justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain." *Zauderer*, 471 U.S. at 641 (emphasis added).

[20] To be sure, policing solicitation via telephone might be marginally more difficult for the state than detecting improprieties in written advertisements. But, as the Court has said, its decisions "involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to

at any point that the recipient of an unwanted call feels unreasonably pressured, he or she can easily terminate the conversation.[21] Expecting business-persons uninterested in a soliciting accountant's services to hang up the phone is "an acceptable burden, at least as far as the Constitution is concerned." *Youngs Drug Products Corp.*, 463 U.S. at 72 (quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1967)). Recipients of unwanted calls, like the readers of unsolicited advertisements, can "effectively avoid further bombardment of their sensibilities" by a means as simple as "averting their eyes." *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). For this reason the Court in *Youngs Drug Products Corp.*, 463 U.S. at 62, 75, extended constitutional protection to unsolicited non-face-to-face communications, even where the recipient "has no commercial interest" in them. *See id.* at 75 (invalidating a statute prohibiting the mailing of unsolicited ads for contraceptives).

Anyone who owns a phone in today's society knows how to hang up on unwanted callers. Each telephone has a button or lever to serve that purpose. Florida's unsubstantiated characterization of the potential for fraud or coercion in a cold-call by an accountant provides no basis for its sweeping ban of all oral unsolicited communications by a particular speaker, whether via the telephone or in person.[22]

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justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646.

[21] In addition, tens of millions of Americans have telephone answering machines with which they can prescreen calls before taking or returning them. Also, in the office, many potential clients of accountants have secretaries who perform this screening function.

[22] As this Court has colorfully put it, the effect of this statute is "to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Moreover, as Congress has recognized, the "[u]se of the telephone to market property, goods and services directly to business customers, as well as to individual consumers is not only a common practice, but also a high growth industry." [23] Telemarketing plays an increasingly important role in providing information about goods and services to the public, as well as the goods and services themselves. Telemarketing also represents an efficient way to provide many goods and services at low cost, on convenient terms and conditions. It is also especially appropriate to the sale of certain types of products and services.[24] Moreover, telemarketing enables new practitioners and start-up businesses to begin to compete at a very low cost; telemarketing thus lowers barriers to entry generally and increases competition.

Notwithstanding these clear benefits of telemarketing, the state has chosen to bar telemarketing along with direct, in-person solicitation by accountants. It has made this decision without legislative or administrative findings, without credible evidence that telemarketing solicitation by accountants places unreasonable pressures on customers, and without determining that existing consumer protection laws do not adequately protect buyers of such services. There were not even the "conclusory statements" found inadequate in *Sable Communications*,

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[23] Telephone Advertising Consumer Rights Act, H.R. Rep. No. 317, 102nd Cong., 1st Sess. (1991). To illustrate, the dollar value of telemarketing sales has grown from just over $80 million in 1984 to roughly $430 billion in 1990. *Id.* at 7. Currently there are 3.5 million people actively engaged in telemarketing, and it is estimated that by the year 2000, eight million people will be engaged in telesales. T. Riordan, *Dead Ringers*, Washington Post Magazine, Feb. 23, 1992, at 12.

[24] By way of example, Olan Mills has found through years of experience that for its line of business—family portraits—there is no substitute for the telephone as a marketing tool. Family portraits are not a product that can be purchased at the spur of the moment at a mall. Only with a telephone can a marketer set an appointment for the family to assemble, scrubbed and dressed, at the local studio.

Inc., 492 U.S. at 129, or the "isolated abuses or mistakes" found insufficient in *Shapero*. Florida's bar on all oral cold-call solicitations by accountants—and especially on such solicitation via telephone—is consequently invalid.[25]

II. TRUTHFUL COMMERCIAL MESSAGES ABOUT LAWFUL PRODUCTS OR SERVICES SHOULD BE ACCORDED FULL FIRST AMENDMENT PROTECTION.

While this Court could simply affirm on the basis of its traditional disapproval of broad prophylactic bans on speech under *Central Hudson's* four-part balancing test, a better approach would be for the Court to hold that truthful commercial speech is entitled to the full protection of the First Amendment.[26] Such a holding would be in accord with the original understanding of the First Amendment and with the *results* of virtually all of this Court's commercial speech cases.[27] Moreover, it would

[25] Florida's attempt to characterize its regulation as a content-neutral time, place and manner restriction cannot save the ban. "The time, place or manner test was developed for evaluating restrictions on public property which had been dedicated as a public forum." *Barnes v. Glen Theater, Inc.*, 111 S.Ct. 2456, 2460 (1991) (citations and quotation marks omitted). Here the communication is entirely private. Nor is the state's restriction content neutral; it prohibits only one subject and category of speech (oral solicitation by accountants about their services) based on the content of the message sought to be conveyed. Moreover, the Court has explicitly rejected an attempt to style a similar prohibition as a permissible time, place, and manner restriction. *See Linmark Assocs. Inc.*, 431 U.S. at 94.

[26] Many of the *amici* who are submitting this brief made this argument at somewhat greater length in a case also under consideration by the Court this term. *See* Brief *Amici Curiae* of American Advertising Federation, American Ass'n of Advertising Agencies, Direct Marketing Ass'n, The Media Institute, and National Ass'n of Broadcasters in Support of Respondents at 24-28, *City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200 (U.S. June 1, 1992).

[27] Whether or not one believes that the text and history of the Constitution determine the outcome of a particular case, the original understanding of the Constitution's terms is without question *relevant* to any attempt to interpret the Constitution. *See, e.g., Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting); *Perpich v. Department of Defense*, 110 S. Ct. 2418, 2422-23 (1990).

eliminate a complex multi-factor balancing test that is undesirable in design and has proved confusing and unpredictable in application.[28]

A. The Original Understanding of the First Amendment Was That Truthful Commercial Messages Are Fully Protected.

While school civics courses tend to present the founding fathers primarily as a group of political philosophers, they were also intensely practical businessmen and farmers. In the text of the Constitution itself, even before there was a bill of rights, they took care to authorize patents and copyrights "To promote the Progress of Science and *useful* Arts." U.S. Const. art. I, § 8 (emphasis added). This practical focus on the "useful" manifests their concern with business and mercantile affairs and, correspondingly, with property rights, which they accorded the same status as other liberties.[29] They accepted the importance of freedom of expression and its

[28] Such standards have been criticized as inherently confusing and tending to invite judges to "mistake their own predilections for the law." A. Scalia, *Orginalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 863 (1989); *see also* A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989). Especially in the First Amendment area, where uncertainty leads to chilling and self-censorship, such balancing tests are undesirable. *Simon & Shuster, Inc. v. New York State Crime Victims Board*, 112 S.Ct. 501, 514 (1991) (Kennedy, J., concurring).

[29] For example, George Mason's Virginia Declaration of Rights stated that the purpose of the Revolution was to secure "the Enjoyment of Life and Liberty, *with the Means of acquiring and possessing Property*, and pursuing Happiness and Safety." Va. Declaration of Rights, art. 1, *reprinted in* H. Miller, *George Mason: Gentleman Revolutionary* 340 (1975) (emphasis added).

inextricable link with property rights, which Cato had articulated as follows: "This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together." J. Trenchard & T. Gordon, 1 *Cato's Letters* 95-103 (1733) (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable From Publick Liberty, February 4, 1720).[30] Given their outlook, the current distinction between so-called "commercial speech" and speech about other matters would never have occurred to the Framers' generation.

This practical concern for business and property was mirrored in the vibrant colonial press. The standard colonial newspaper was almost half-filled with local advertising. L. Wroth, *The Colonial Printer* 234 (1938). To illustrate, in 1766 Hugh Gaine's *New York Mercury* was 70% advertising, and 55% of the *Royal Gazette* was commercial matter. A. Lee, *The Daily Newspaper in America* 32 (1937).[31] For much of that era, the newspapers did not use layout, typeface, or similar techniques to differentiate commercial and editorial matter. Middleton, supra, at 281. "Advertisements had as much

[30] The libertarian *Cato's Letters*, published from 1720-1724 and widely circulated in the colonies, were "the most popular, quotable, esteemed source of political ideas in the colonial period." C. Rossiter, *Seedtime of the Republic* 141 (1953). In particular, Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America. J. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (1988).

[31] The majority of the ads which appeared in colonial newspapers would today be considered "commercial speech." K. Middleton, Commercial Speech in the Eighteenth Century, *Newsletters to Newspapers: Eighteenth Century Journalism* 277 (D.H. Bond & W.R. McLeod, eds., 1977) ("The colonial press regularly carried reputable medical ads, as well as those for books, cloth, empty bottles, corks, and other useful goods and services."). Without these ads, the colonial press so important to the Revolutionary cause would not have existed. During the Eighteenth Century, like today, "[a]dvertising represented the chief profit margin in the newspaper business." *Id.* at 56.

interest as the news columns, perhaps greater interest . . . . Arrival of a new cargo . . . likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe." F. Presbrey, *The History and Development of Advertising* 154 (1929).

The full integration of editorial and commercial matters in the press reflected the colonial view that the benefits of freedom of expression extended to the entire spectrum of human endeavors. For example, among the reasons given by the Continental Congress to settlers in Quebec for the importance of a free press was "the advancement of truth, science, morality, and arts in general." Address to the Inhabitants of Quebec (1744), *reprinted in* B. Schwartz, 1 *The Bill of Rights: A Documentary History* 223 (1971). This view encompassed commercial communications as well. For example, Richard Henry Lee of Virginia—perhaps the leading Anti-Federalist—said in his demand for a bill of rights that "a free press is the channel of communication to *mercantile* and public affairs. . . ." Letter XVI of R.H. Lee, January 20, 1788, in *An Additional number of Letters from the Federal Farmer to the Republican* 151-53 (1962) (emphasis added), *reprinted in Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories* 144 (Leonard Levy, ed., 1966).[32]

[32] The twin concepts of freedom of speech and of the press were considered as two sides of the same coin, serving the same purposes, and were often referred to interchangeably. As the Virginia Gazette said on May 18, 1776, "The *use of speech* is a *natural right* . . . [and] [p]rinting is a more extensive and improved kind of speech," *quoted in* Miller, *supra*, at 148 (emphasis in original). Thus, this Court has treated the freedom of speech and press as coterminous. *See, e.g., First National Bank v. Bellotti*, 435 U.S. 765, 781-83 (1978).

The constitutions of the several states reveal the interchangeable nature of the terms to describe the identical set of rights. For example, Pennsylvania's 1776 Declaration of Rights stated: "That

Thus, the generation of the Framers understood the value of commercial messages. As the prominent printer-historian Isaiah Thomas, editor of a "violently pro-Revolutionary" newspaper, wrote:

> [Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.

History of Printing in America with a Biography of Printers, and an Account of Newspapers (1810), *quoted in* D. Boorstin, *The Americans: The Colonial Experience* 328, 415 (1958).

Given the prevalence and importance of commercial messages in colonial America, it is not surprising that the very idea of "the freedom of speech, or of the press" evolved in close connection with the development of advertising. In fact, one of the best-known statements in

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the people have a right to *freedom of speech*, and of writing, and publishing their sentiments; therefore *the freedom of the press* ought not to be restrained." Pa. Const. art. XII (1776), *quoted in* 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3083 (F. Thorpe, ed., 1909) (emphasis added). *See also* B. Schwartz, 2 *The Bill of Rights: A Documentary History* 658 (1971) (reporting proposed Bill of Rights adopted at the Pennsylvania ratifying convention of 1787, using almost identical language).

Tellingly, Thomas Jefferson's proposed modification to Madison's initial draft of the First Amendment provided that "[t]he people shall not be deprived or abridged of their right to *speak, to write,* or *otherwise* to publish anything but false facts . . . ." 15 *The Papers of Thomas Jefferson* 367 (J. Boyd ed. 1958) (emphasis added). *See also* L. Levy, *Legacy of Suppression* 174 (1960) ("[F]reedom of speech and freedom of the press, being subject to the same restraints of subsequent punishment were rarely distinguished. Most writers, including Addison, Cato, and Alexander, who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press.").

defense of the freedom of expression was written in response to an attack on a commercial message printed by Benjamin Franklin. In 1731, Franklin printed an advertising notice for a ship's captain. The ad was not part of a newspaper; it was distributed as a stand-alone commercial handbill. The paper simply "propose[d] a commercial transaction," *Virginia Board of Pharmacy*, 425 U.S. at 760 (quoting *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975)), by seeking additional freight and passengers for the captain's ship. At the bottom of the ad was the note "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers*, The Pennsylvania Gazette, June 10, 1731, *reprinted in* 2 *Writings of Benjamin Franklin* 172, 176 (1907).

This handbill outraged the local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response to attacks on the ad, Benjamin Franklin published his *Apology for Printers* which, at that time, was "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, *Printers and the American Revolution in The Press and the American Revolution* 20 (B. Bailyn & J. B. Hench, eds., 1980). Franklin's *Apology* contended that "Printers are educated in the Belief that when Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick." *An Apology for Printers, reprinted in* 2 *Writings of Benjamin Franklin* at 174.[33] This incident illustrates that, at least to Franklin, the "Opinions" stated

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[33] This echoed the sentiment in *Cato's Letters*, that "Whilst all Opinions are equally indulged, and all Parties equally allowed to speak their Minds, the Truth will come out." J. Trenchard & T. Gordon, 3 *Cato's Letters* 295 (1733). *Compare Abrams v. United States*, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market") (Holmes, J., dissenting).

even in advertisements should be "heard by the Publick." Thus, America's first sustained defense of freedom of expression, and of the very notion of a "marketplace of ideas," came in response to an attack on commercial speech.[34]

The First Amendment sprang from this background. Its authors were accustomed to the idea that commercial speech had important practical value. Their regard for free expression had been critically shaped by Franklin's defense of a commercial handbill. Thus, when the First Amendment provided categorical protection for freedom of expression without any halfway house for commercial speech, it must be understood to have meant what it said and to have extended its full protection to truthful commercial discourse.[35]

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[34] In addition, one of the major precipitating events of the American Revolution also involved a defense of commercial messages. The Stamp Act of 1765 taxed each newspaper—and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. J. Lofton, *The Press as Guardian of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act of 1765 was in large part, if not primarily, based on their concern that it encroached on the freedom of expression. A. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1966).

[35] Of course, the government may ban the dissemination of false or misleading commercial messages. *See, e.g., Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979). This may be true either because, by definition, such messages are excluded from the First Amendment or because the government is always presumed to have a compelling interest in preventing deception. In any event, such a view comports with the original understanding of the First Amendment, which was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation. *See* W. Blackstone, 3 *Commentaries on the Laws of England* 431 (1768); J. Story, *Equity Jurisprudence* §§ 191, 192 (1836); W. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of action of deceit from mid-fourteenth century). The government may therefore police the veracity of commercial speech, whereas its ability to regulate "false" or misleading political speech, for example, is far more constrained. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"). Accordingly, regulation of false or misleading speech under laws such as the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* (1988), are not unconstitutional.

B. The Results of This Court's "Commercial Speech" Decisions Generally Have Protected Truthful Commercial Messages.

As the discussion in Part I illustrates, this Court's commercial speech decisions since *Virginia Board of Pharmacy* have generally upheld restrictions which ostensibly prevented consumers from being misled—while striking down numerous regulations on commercial communications which were designed to advance other purported governmental interests.[36]

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[36] *See, e.g., Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990) (overturning censure of an attorney and reaffirming Court's commitment to "the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information.") (Stevens, J., plurality op.); *Shapero*, 486 U.S. at 479-80 (truthful, non-deceptive letters sent to individuals known to face particular legal problems were constitutionally protected); *Zauderer*, 471 U.S. at 651 (approving a requirement that attorneys inform the public that they may be responsible for costs, if not legal fees, if they hire a lawyer on a contingent fee basis because it was "reasonably related to the state's interest in preventing deception of consumers"); *Youngs Drug Products Corp.*, 463 U.S. at 80 (striking down ban on truthful unsolicited advertisements); *In re R.M.J.*, 455 U.S. at 191 (rule limiting dissemination of truthful advertising violated First Amendment); *Central Hudson*, 447 U.S. at 571-72 (regulation restricting non-deceptive advertisements promoting use of electricity violated First Amendment); *Friedman*, 440 U.S. at 13 (upholding ban on the use of trade names by optometric offices on the ground that "there is a significant possibility that trade names will be used to mislead the public"); *Bates*, 433 U.S. at 384 (truthful attorney advertising constitutionally protected); *Carey v. Population Servs. Int'l.*, 431 U.S. 678, 701-02 (1977) (law restricting advertising of contraceptives violated First

Such a rule does not deny "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech." *Ohralik*, 436 U.S. at 455-56 (quoting *Virginia Board of Pharmacy*, 423 U.S. at 771 n.24). Rather it respects the distinction, embedded in the common law, which permits broader regulation of the content of advertising to ensure its veracity. *See supra* note 35. Such regulations, however, are subject to review by the courts to ensure that the government is not using its police power to define commercial fraud and misrepresentation as a pretext to punish or censor truthful and lawful (protected) communications.[37] And the First Amendment certainly prohibits a restriction on speech which serves no purpose other than as a barrier to entry.

Although the Court functionally has accorded truthful speech about lawful products and services the full protection of the First Amendment, the Court has departed from this approach when explaining its actions and has adhered to the four-part *Central Hudson* test. As demonstrated above, however, there is no textual or historical justification for the *Central Hudson* test itself. This Court was correct in *Virginia Board of Pharmacy* when it extended First Amendment protection to "concededly truthful information about entirely lawful activity." 425 U.S. at 773. The *Central Hudson* test, which was developed later, has led at times to results that are clearly in-

Amendment since it did more than limit misleading or deceptive speech); *Linmark Assocs., Inc.*, 431 U.S. at 98 (ordinance prohibiting "for sale" signs violated First Amendment because it inhibits free flow of truthful information); *Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975) (editor could not be prosecuted for running non-deceptive advertisement for a legal service).

[37] Even the ban on in-person solicitation by lawyers upheld in *Ohralik*, 436 U.S. 447, was found to be constitutional because it prevented attorneys from taking commercial advantage of prospective clients who may be mislead or deceived in the proposed transaction.

consistent with the spirit of *Virginia Board of Pharmacy* itself.[38]

C. The *Central Hudson* Balancing Test Should Be Abandoned, and Full First Amendment Protection Extended to All Truthful Speech About Lawful Products or Services.

Despite the importance of *stare decisis*, this Court should abandon *Central Hudson*'s multi-factor balancing test and, instead, implement the original understanding of the First Amendment to protect truthful speech about

[38] Most significantly, in *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), the Court upheld Puerto Rico's restriction on advertising of casino gambling aimed at residents of Puerto Rico. Applying *Central Hudson*, the Court concluded that Puerto Rico's "substantial" interest in "reduc[ing] . . . demand for casino gambling by the residents of Puerto Rico" was "directly advance[d]" by limiting the availability of such advertising to the inhabitants of Puerto Rico. *Id.* at 341. A major flaw with this approach is that it can be employed by proponents of regulation in an effort to justify restrictions on commercial messages about any product which *could be* banned by Congress or state legislatures. In addition, an important purpose of the law upheld in *Posadas* was to protect a vulnerable population, *see id.*—a feature entirely absent here. *See supra* note 10 and accompanying text.

Moreover, the Court attempted to buttress its opinion in *Posadas* by contending that the "greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling," *id.* at 345-46, an argument which has been widely criticized. *See, e.g.*, A. Kozinski & S. Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990); P. Kurland, *Posadas de Puerto Rico v. Tourism Co.: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wonderous Pitiful"*, 1986 Sup. Ct. Rev. 1. It was also repudiated in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-63 (1988) ("[T]hat ['greater-includes-the-lesser'] syllogism is blind to the radically different constitutional harms inherent in the 'greater' and 'lesser' restrictions. . . . [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.") (footnote omitted).

lawful products or services. Such a step is appropriate because:

- Interpretation of the First Amendment is a constitutional matter as to which Congress' legislative powers provide no ready corrective;
- Given the results of the Court's application of the *Central Hudson* test, this approach would not require substantial modification of previously approved government policies or of this Court's jurisprudence;
- Extensive reliance on the *Central Hudson* test is unlikely to have occurred;[39] and
- The lower courts have experienced serious difficulty in applying the *Central Hudson*'s complex multi-factor balancing test in a consistent and principled way.[40]

The Court thus can and should conform its jurisprudence to the original understanding of the First Amendment. Were it to do so, Florida's ban clearly would be unconstitutional because, inevitably, a blanket ban on all oral cold-call solicitation by accountants limits the ability of CPAs to communicate in a truthful, non-coercive manner about the services they can provide. *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). This impermissibly fails to differentiate the fully protected from the unprotected, the "truthful from the false, the helpful from the misleading, and the harmless from the harmful."

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[39] *Payne v. Tennessee*, 111 S.Ct. 2597, 2609-10 (1991).

[40] *Compare, e.g., Actmedia, Inc. v. Stroh*, 830 F.2d 957, 967-68 (9th Cir. 1986) (state law prohibiting placement of alcohol advertising signs on shopping carts constitutional) *with National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 556 (2d Cir.) (certain ordinances prohibiting maintenance of off-premises signs unconstitutional), *cert. denied*, 111 S.Ct. 146 (1990); *Ackerly Communications, Inc. v. City of Somerville*, 878 F.2d 513, 522 (1st Cir. 1989) (ordinance prohibiting maintenance of off-premises sign boards unconstitutional).

Zauderer, 471 U.S. at 646.[41] Accordingly, the Court should affirm the judgment below.

CONCLUSION

For the reasons set forth herein, *amici* respectfully request that this Court affirm the decision of the Court of Appeals for the Eleventh Circuit striking down Florida's ban on oral cold-call solicitation by accountants as violative of the First Amendment.

Respectfully submitted,

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[41] Instead, the state must proceed "by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Village of Schaumberg*, 444 U.S. at 637.

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IN THE
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OCTOBER TERM, 1992

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Petitioners,

v.

SCOTT FANE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC., IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC., IN SUPPORT OF RESPONDENT

CONSENT OF THE PARTIES

Petitioners, Fred H. Edenfield, et al., and Respondent, Scott Fane, have consented to the participation of the American Association of Attorney-Certified Public Accountants, Inc. in these proceedings, as amicus curiae in support of Respondent. Their consents have been filed with this Court.

INTEREST OF AMICUS CURIAE

The American Association of Attorney-Certified Public Accountants, Inc. ("AAA-CPA") is a not-for-profit corporation, formed in 1964 and now headquartered in

California, with members located all over the United States. Every member has been licensed as both an attorney and a certified public accountant ("CPA").

AAA-CPA is dedicated to ensuring that its members observe the highest professional and ethical standards in service to their clients and the public. At the same time, AAA-CPA supports the right of practitioners to disclose truthful information about ~~their~~ qualifications, and to engage in the practice of their professions.

AAA-CPA is active in advocating the rights of individuals, such as its members, who are dually licensed both as attorneys and as CPAs. AAA-CPA asserts the right of these individuals to hold themselves out as being licensed to practice both professions, and to engage in the practice of both, provided these individuals comply with the applicable standards of professional conduct.

AAA-CPA is in a unique position to appreciate the differences between the professional duties of attorneys on the one hand, and CPAs on the other. Because of these differences in professional duties, the state has a legitimate interest in regulating each profession by a distinctive set of standards, which are similar in some respects and different in others. Depending on the nature of the engagement, dual licensees must comply with one set of standards, or the other, or both. Dual licensees can discern and conform to the applicable set of standards, in much of the same way as attorneys engaged in the multistate practice of law can discern and conform to the standards of the applicable jurisdiction.

Although one set of standards governs attorneys and another set governs CPAs, a single pervasive principle applies with equal force to the regulation of each profession: the state should impose no restriction unless required by the public interest. When the regulation affects truthful speech, the state should impose restrictions only in narrowly-defined situations and only in

response to a demonstrated need to protect a substantial public interest.

The Florida rule at issue in this case imposes inappropriate restrictions on truthful speech. The rule is not required by the public interest, and clearly fails to withstand scrutiny under this Court's tests. AAA-CPA accordingly supports the position of Respondent, in seeking to uphold the judgment of the Eleventh Circuit declaring this rule unconstitutional.

SUMMARY OF ARGUMENT

I. The Florida rule, prohibiting CPAs from engaging in direct, uninvited, in-person solicitation, is not required by a substantial public interest. Its only demonstrable purposes are to maintain the etiquette of practitioners and to protect them from competition. It therefore violates the First Amendment.

II. Solicitation by CPAs, at issue in this case, is distinguishable from solicitation by attorneys. This Court can therefore invalidate the Florida rule which restricts solicitation by CPAs without considering prior cases involving solicitation by attorneys.

ARGUMENT

I. THE FLORIDA RULE IS NOT REQUIRED BY A SUBSTANTIAL PUBLIC INTEREST, AND THEREFORE VIOLATES THE FIRST AMENDMENT

Practitioners should be free to disclose truthful information about their qualifications, and to engage in the practice of their professions, without the state imposing unnecessary regulations. The state has a legitimate interest in establishing and enforcing standards of conduct, but these standards should impose no restrictions on truthful speech beyond those required by a demonstrated need to protect a substantial public interest. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), *Ohralik v.*

Ohio State Bar Ass'n., 436 U.S. 447 (1978), *Central Hudson Gas & Electric Corp. v. Public Service Comm'n. of New York*, 447 U.S. 557 (1980), *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989).[1]

A. The Only Demonstrable Purposes of the Rule Are To Maintain Etiquette and Protect CPAs From Competition

The history of the rule against solicitation by Florida CPAs falls into three time periods: (1) 1905-1969; (2) 1969-1979; and (3) 1979 onwards. Each period starts with the enactment of a significant Florida statute. In summary, this history shows that the rule originated as an ethical standard of voluntary professional associations of CPAs, for the purpose of maintaining etiquette and protecting practitioners from competition. Decades later, the state conferred the force of law upon the rule. In doing so, the state did not demonstrate any purpose except to preserve the original purposes of the ethical standard. A rule serving these purposes cannot withstand First Amendment scrutiny.

1. *History, 1905-1969*

Florida enacted its first statute regulating the public accounting profession in 1905.[2] The original statute made

[1] Respondent's brief thoroughly analyzes these and other relevant cases. To avoid needless repetition, this amicus curiae brief does not restate the analysis or arguments contained in Respondent's brief.

[2] The history of Florida statutory law included here is based, in part, on "A Review of Chapter 473, Florida Statutes: Public Accountancy," prepared in September 1984 by staff of the Florida Senate Economic, Community, and Consumer Affairs Committee. Excerpts are set forth in an Appendix to this brief. *See also* Florida Institute of Certified Public Accountants, HISTORY OF THE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS 1905-1962 (1963).

no mention of advertising or solicitation. The statute was amended a number of times, but it contained no mention of advertising or solicitation until 1969.

Ethical Codes of AICPA and FICPA

Any CPA who chose to become a member of the American Institute of Certified Public Accountants ("AICPA") undertook to comply with the AICPA Code of Ethics. The first version of the AICPA Code, adopted in 1917, prohibited CPAs from soliciting each others' clients. A revision in 1948 extended the prohibition, to prevent advertising and solicitation in general. *See* Report of the AICPA Special Committee on Solicitation (1981), Joint Appendix ("JA") 43-46.

The only sanction faced by violators of the AICPA Code was loss of membership in that organization. In 1923, partners in the CPA firm of Ernst & Ernst resigned their AICPA membership when the organization threatened to expel them for engaging in aggressive (and successful) advertising and solicitation. From then onwards, the AICPA "rigorously enforced" its rule. John L. Carey, THE RISE OF THE ACCOUNTING PROFESSION: FROM TECHNICIAN TO PROFESSIONAL 1896-1936, at 233-34 (1969).

The AICPA prohibition against solicitation was designed to serve two purposes: to maintain the etiquette of the profession, and to prevent CPAs from competing against one another.[3] An editorial in the 1927 Journal

[3] John L. Carey, THE RISE OF THE ACCOUNTING PROFESSION: FROM TECHNICIAN TO PROFESSIONAL 1896-1936 at 85, 88-90 (1969) notes that the AICPA's rules against advertising and solicitation reflect the influence of English and Scottish chartered accountants. Paul J. Miranti, Jr., ACCOUNTANCY COMES OF AGE: THE DEVELOPMENT OF AN AMERICAN PROFESSION, 1886-1940, at 77-78, 117-20 (1990) confirms this view, and adds that the AICPA rules against advertising and solicitation were, in part, an attempt to initiate the American Bar Association. *See also* Thomas D. Wood & Anne J. Sylvestre, *The History of Advertising by Accountants* 12 ACCOUNTING HIST. J., Fall 1985 at 59.

of Accountancy observed that practitioners had the legal right to solicit business, although this conduct would be a serious breach of etiquette. Editorial, 44 J. Acctcy., Nov. 1927, at 360.

Any Florida CPA who chose to become a member of the Florida Institute of Certified Public Accountants ("FICPA") undertook to comply with the FICPA Code, modeled on that of the AICPA.[4] The only sanction was loss of membership in FICPA.

Rules of State Board of Accountancy

Before enactment of the 1969 statute, the Florida Board of Accountancy adopted rules prohibiting CPAs from advertising or soliciting.[5] The Board evidently based these rules on its power, under statutes going back to 1905, to adopt rules regulating the practice of public accountancy.

Florida Supreme Court

The Florida Supreme Court invalidated parts of the Board's rules during this period. Although these decisions do not relate to solicitation, they indicate that the rules contained features which were held invalid because of their protectionist policy. The rule held invalid in *Florida Accountants Ass'n v. Dandelake*, 98 So.2d 323 (Fla. 1957) allowed only CPAs to hold themselves out as "accountants," while the rule held invalid in *Mercer*

[4] The FICPA added a set of Rules of Professional Conduct to its bylaws in 1956. Florida Institute of Certified Public Accountants, HISTORY OF THE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS 1905-1963 (1963) at 51. The FICPA rule against solicitation was modified in the early 1980s, under the threat of antitrust litigation, Dooner affidavit, JA 20.

[5] Harry M. Turnburke, *An Ethics Examination for CPA Candidates*, 109 J. Acctcy, No. 4, Apr. 1960, at 70, 71 refers to a test on the rules of ethics of the Florida Board of Accountancy, including rules against solicitation. The author remarks: "One applicant frankly saw no harm in soliciting a client with whom there had been no prior connection of any kind."

v. Hemmings, 170 So.2d 33 (Fla. 1964) made it virtually impossible for out-of-state CPAs to qualify for Florida licenses.

2. History, 1969-79

The 1969 revision of the Public Accountancy Act included the state's first statutory prohibition against advertising or solicitation by CPAs. The prohibition was complete.[6] The ethical rules of the AICPA and FICPA remained in effect, and the Board's rules now had the support of express statutory authority. During the decade 1969-1979, the prohibition against solicitation was expressed simultaneously by statute, Board rules, and ethical rules of the AICPA and FICPA.

Events occurring between 1969 and 1979

The prohibition that appeared so firmly entrenched in 1969 was weakened by a number of events during the ensuing decade. First, this Court announced its decisions in *Bates* and *Ohralik*.

Second, the Federal Trade Commission and the Antitrust Division of the Justice Department placed pressure on the AICPA to repeal its rules against advertising and solicitation. JA 20-22. This pressure cast serious doubt on the ability of private organizations (such as AICPA and FICPA) to prevent CPAs from advertising or soliciting. If such prohibitions were to be in place, they could be imposed only by the state because the state was exempt from the antitrust laws. The state, however, was under constitutional constraints.

[6] Laws of Fla., ch. 69-36, Sec. 28, creating Fla. Stat. Sec. 473.29, provided that a CPA shall not:

> directly or indirectly solicit public accounting engagements to be performed in the state: (1) by means of circulars or advertisements or by unsolicited personal communication or interview or by any other means . . .

Third, the Florida legislature enacted the Regulatory Reform Act of 1976, establishing a system of "sunset" review of state statutes. This Act established an agenda of statutes to be reviewed, and included two expressions of legislative intent: first, that no profession would be subject to the state's regulatory power except to the extent necessary to protect the public from significant and discernible harm or damage; second, that the state would not regulate a profession in a manner which would unreasonably adversely affect the competitive market.[7]

3. *History, 1979 onward*

1979 Florida statute and rule

The legislature revised the accountancy statute substantially in 1979. The 1979 language remains in the current version of the statute.[8]

In 1979, shortly after enactment of this statute, the Board adopted Florida Administrative Code, Rule 21A-24.002, Solicitation.[9] This rule has remained unchanged

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[7] The sunset statute was originally enacted by Laws of Fla., ch. 76-168. It remains essentially the same, with minor stylistic changes, codified as Fla. Stat. Sec. 11.61.

[8] Laws of Fla. Ch. 79-202, creating Fla. Stat. Sec. 473.323(1)(*l*). It prohibits a CPA from

> (1) Engaging in direct, in-person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the Board.

[9] Section 21A-24.002 provides, in material part:

> (2) A licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services: . . . (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication.

Section 21A-24.002(3) defines the term "direct, in-person, uninvited solicitation," as used above, to mean:

> any communication which directly or implicitly requests an immediate oral response from the recipient.

The same subsection continues:

> Uninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited.

since then, except for a minor amendment not relevant to this case.

Withdrawal of AICPA and FICPA rules

The AICPA and FICPA withdrew their anti-solicitation rules in the early 1980s under threat of antitrust action by the Federal Trade Commission and the Antitrust Division. JA 20.

1979 statute, viewed as response to events of 1969-79

The 1979 statute appears to respond, to some extent, to each of the occurrences noted above. It responds to *Bates* by allowing advertising. It responds to *Ohralik* by preserving as much of the prohibition against solicitation as appeared at the time to be allowable under *Ohralik*, and by inserting the "except" clause to protect the statute against post-*Ohralik* developments. This clause guarantees that the statute itself will not run afoul of the free speech guarantees of the state and federal constitutions. The clause, however, leaves the Board's rules open to challenge on First Amendment grounds. This case presents such a challenge.

The 1979 statute can be viewed, moreover as a response to the antitrust proceedings against the AICPA. Recognizing that the Codes of the Ethics of AICPA and FICPA were vulnerable to attack on antitrust grounds, the legislature in 1979 gave the Board as much power as was constitutionally tolerable, to achieve by state action the policies which could no longer be achieved by the AICPA or FICPA.

The 1979 statute appears also to respond, to some extent, to the sunset law. By deregulating some practices which the 1969 Act had prohibited (such as advertising and indirect solicitation), the 1979 statute carries out part of the pro-competitive policy expressed in the sunset law. However, the 1979 statute fails to implement that policy completely. The pro-competitive policy expressed in general terms in the sunset law contrasts with the protectionist policy imposed by the anti-solicitation provision of the accountancy law. While this contrast reveals some legislative ambivalence, one point is clear: neither the sunset law nor the accountancy law reveals any purpose for the anti-solicitation rule, other than to maintain etiquette and to limit competition.

Legislative committee staff's recommendation to repeal statute in 1984

The 1979 anti-solicitation statute remains on the books, although the staff of a legislative committee recommended its repeal in 1984. The recommendation was contained in a report by the staff of the Florida Senate Economic, Community, and Consumer Affairs Committee, prepared for "sunset" review purposes.

The 1984 staff report concludes that the statutory provisions prohibiting solicitation are designed to protect practitioners from competition, in violation of the pro-competitive policy announced in the sunset law. (Excerpts of the staff report are set forth in the Appendix to this brief.) Notably, the staff report documents absolutely no situations in which solicitation by CPAs led to fraud, injury, or other impropriety. Despite the staff report and recommendation, the legislature reenacted the accountancy law in 1985 without significant change.

As indicated by the above history of the anti-solicitation rule, the only demonstrable purposes of the rule are to

maintain etiquette and limit competition. These purposes originated in the ethical rules of voluntary associations. They received the force of law much later, with no other demonstrable purpose.

B. The Evidence Refutes Petitioners' Assertion That the Purpose of the Rule Was To Protect the Integrity of the Attest Function

Petitioners assert that the purpose of the rule was to protect the integrity of the attest function. The evidence refutes this assertion in a number of ways.

First, the amicus curiae brief of the FICPA, in support of Petitioners, describes the purposes of the 1979 statute, using language which almost precisely tracks this Court's language in *Ohralik*. *See* FICPA br., at 6 (describing purposes of 1979 statute) and virtually identical language, id. at 8, summarizing *Ohralik*. This recitation reveals that the *strategic* purpose of the 1979 statute was to survive challenge under *Ohralik*, so as to preserve as much as possible of the *policy* purpose of the 1969 statute.

Second, the rule on its face applies to CPA solicitation for all types of engagements. If, however, Petitioners were correct in asserting that the rule was intended to protect the integrity of the attest function, the rule would have been written more narrowly, to apply only to attest engagements.

Third, and most remarkably, Petitioners have not placed a single piece of evidence in the record of this case to demonstrate that the rule now serves or ever has served any purpose other than those originally served by the ethical standards of the voluntary associations: preserving etiquette and protecting practitioners from competition. Independent research by AAA-CPA, in preparing this amicus curiae brief, has disclosed no evidence to demonstrate that the rule was ever intended to serve, or has ever served, any other purpose.

C. The Rule Does Not Pass First Amendment Scrutiny

Petitioners' brief repeatedly argues that the statute and rule are constitutionally authorized because of the state's interest in the "professionalism," "public image," or "prestige" of the public accounting profession. These terms are broad enough to include some matters in which the state has a substantial interest, and others in which it does not.

The state clearly has a substantial interest in assuring that candidates for the CPA license are appropriately qualified, that unauthorized persons do not hold themselves out as CPAs, and that CPAs perform their professional engagements with appropriate skill and honesty. These are essential components of professionalism. The anti-solicitation rule at issue in this case does not address any of these purposes. Each of the other actual or alleged purposes will next be considered.

1. *Etiquette*

This brief has indicated that one purpose of the anti-solicitation rule is to maintain the etiquette of the profession. Many practitioners continue to comply voluntarily with traditional standards of etiquette, as matters of personal preference, and many feel uncomfortable when they observe the decline in other practitioners' compliance with these standards.[10]

However, the state should not exercise its police power to enforce standards of professional etiquette. The state's interest in etiquette, if one exists at all, is not substantial

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[10] *See* George M. Dupuy, *The Direct Solicitation Issue*, 150 J. Accty, Oct. 1984, at 84; Herman J. Lowe, *Ethics in Our 100-Year History*, 163 J. Accty., May 1987, at 78. The survey of AICPA members, conducted for the Special Committee on Solicitation, shows agreement that "direct uninvited solicitation adversely affects the public image of CPAs . . . , is not in the public interest, will tend to lower CPA fees . . ." JA 58.

enough to justify state-imposed restraints on speech. *Bates*, 433 U.S. at 368-73; *Ohralik*, 436 U.S. at 460.

2. *Preventing competition*

This brief indicates that another purpose of the anti-solicitation rule is to protect CPAs from competition. It is clear from *Bates* and *Ohralik* that states may not prohibit speech for the purpose of preventing competition. According to these cases, the First Amendment guarantees the free flow of truthful commercial speech, except in the limited circumstances where *Ohralik* allows the state to restrain speech.

3. *Prophylactic measure to protect integrity of attest function*

Petitioners argue that the rule against solicitation is justified as a prophylactic measure to preserve the integrity of the attest function. Petitioners' argument is not convincing, for the following reasons. First, as discussed earlier in this brief, there is absolutely no indication this was the legislative purpose.

Second, even if the state did intend to protect the integrity of the attest function, the anti-solicitation rule is not designed to serve that purpose. Other means, more effective and appropriate than the anti-solicitation rule, are already in place to protect the integrity of the attest function. These measures include professional standards governing the performance of the engagement, malpractice suits, SEC discipline, and continuing professional education. Petitioners have failed to demonstrate that the anti-solicitation rule is needed or would even have any effect in protecting the integrity of the attest function.

In view of Petitioners' failure to demonstrate any justifiable purpose for the anti-solicitation rule, it does not pass constitutional muster under the level of scrutiny

required in First Amendment cases, or indeed under any other level of scrutiny.

II. SOLICITATION BY CERTIFIED PUBLIC ACCOUNTANTS IS DISTINGUISHABLE FROM SOLICITATION BY ATTORNEYS

In *Ohralik*, this Court allowed a state to discipline an ambulance-chasing attorney who solicited potential new clients. The present case is distinguishable, because the state regulation at issue here involves solicitation by CPAs, not by attorneys. Because the two professions are different, this Court can strike down the Florida rule against solicitation by CPAs without having to reconsider *Ohralik*.

Lawyers are licensed to litigate; CPAs are not. CPAs are licensed to express independent opinions based on objective audits of financial statements, and to confer on these opinions the credibility of the CPA profession; lawyers are not. This is the crux of the distinction between the two professions.

The license to practice law gives the lawyer the opportunity to inflict serious harm upon clients or others, for example by filing vexatious lawsuits, making abusive discovery requests, delaying settlement negotiations, neglecting a client's matter, or participating in the client's fraudulent conduct.

Proof of these improprieties is sometimes difficult to obtain, because many communications are oral and some are privileged. But if any of these improprieties can be proved, the lawyer is subject to discipline. Civil remedies are often available to the victim, but some types of abuses cause irreparable injury. The state therefore has a strong interest in taking prophylactic measures to prevent these abuses. If the state can demonstrate a pattern of irreparable injury resulting from the solicitation of business by attorneys, the state may be justified in regulating relevant types of solicitation.

The CPA license gives the practitioner the opportunity to inflict serious harm, but the harm is generally of a financial nature, affecting the client or third parties who rely on the CPA's audit. A CPA who solicits in the business setting deals with experienced and sophisticated potential clients, who are capable of evaluating the CPA's qualifications and proposed services. If an auditor commits misconduct, the facts can generally be proved by resort to the documentary record of the audit. The harm can generally be remedied adequately by money damages.

Despite these generalities about the harms most likely to result from improper audits, it is hypothetically possible that enforcement authorities could document a pattern of abuses by CPAs, resulting from the solicitation of clients, and causing irreparable harm. Upon such a demonstration, the state might be justified in regulating solicitation by CPAs.

In this case the state has made absolutely no attempt to present any such demonstration. Accordingly, the state has not shown that it has a substantial interest in regulating or prohibiting solicitation by CPAs.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the Eleventh Circuit, holding the Florida rule unconstitutional.

Respectfully submitted,

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APPENDIX

APPENDIX

Florida Senate, Staff of Economic,
Community, and Consumer Affairs Committee,
A Review of Chapter 473, Florida Statutes,
Public Accountancy (September 1984) (excerpts)

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[1] I. *Introduction*

The Regulatory Sunset Act, section 11.61, Florida Statutes, (ch. 81-318, L.O.F.) provides for a systematic repeal of those statutes which regulate initial entry into and practice of certain professions, occupations, businesses, and industries. Each year several statutes are scheduled for repeal unless revised or reenacted after an orderly review process. This review concerns chapter 473, Florida Statutes, which provides for state regulation of public accountancy. This chapter will be automatically repealed on October 1, 1985, unless reenacted by the Legislature.

The Regulatory Sunset Act sets forth specific criteria for the review of statutes scheduled for repeal. In essence, these criteria mandate a determination as to whether the law relating to public accountancy is a legitimate exercise of the state's police power. Stated another way, the primary question considered in this review is:

> Does the law relating to public accountancy protect the public from serious potential harm to such an extent that if chapter 473, Florida Statutes, was repealed, the public's health, safety, or welfare would be threatened?

If the answer is negative, staff must recommend the chapter be allowed to repeal. However, if the answer is positive, then the statute must be evaluated to determine whether it is tailored to address the potential for serious public harm at the least possible public cost.

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[6] 1. *History*

Chapter 5425, Laws of Florida, 1905, created the first Florida State Board of Accountancy. Any person who was over the age of 21 years, of good moral character, and a high school graduate was qualified to take the accountancy examination. Only persons who passed this examination could use the designation certified public accountant. The board could revoke a certificate for "unprofessional conduct of the holder of such certificate or for other sufficient cause." The law was substantially amended by chapter 12290, Laws of Florida, in 1927 when grounds for revocation or suspension of a certificate were expanded providing greater specificity. The board was authorized to promulgate canons of professional ethics, violation of which was grounds for suspension of a certificate.

[7] The board was also authorized to issue a "public accountant" certificate to any non-CPA who was practicing accountancy prior to 1928.

Chapter 15637, Laws of Florida, 1931, declared communications between accountants and their clients to be privileged, and it was made a misdemeanor for any person to violate any of 15 specified prohibitions. The law established eight grounds for the revocation or suspension of a certificate, one of which incorporated the 15 prohibitions mentioned above.

Chapter 17266, Laws of Florida, 1935, created a civil remedy which allowed the board to seek an injunction to prevent the violation of the laws relating to accountancy.

The method of funding the board was changed several times over the years. Originally, the board operated solely from the revenue it collected. In 1951 the expenses of the board were paid from, and surplus fees were paid to, the General Revenue Fund (chapter 26869, L.O.F.). In 1953 fees were deposited in, and expenses were paid from, a state agency's fund. A separate trust fund in the state treasury was created for the board in 1961.

All money collected by the board was deposited in that fund, and the board's expenses were payable solely from that fund. Ten percent of the revenue collected every year was to be transferred to the General Revenue Fund (ch. 61-514, L.O.F.).

Chapter 69-36, Laws of Florida, substantially revised the accountancy law. Applicants for the examination were required to be United States citizens domiciled in the state. [8] After passing the examination, applicants were required to complete a 1-year internship in the office of a Florida practitioner or an additional year of college course work in accounting. An ethics section was added to the examination. Contingent fees, competitive bidding, and solicitation of clients were prohibited.

Chapter 73-270, Laws of Florida, required practitioners to periodically reestablish their professional knowledge and competency by completing a continuing education program or passing a written examination.

Chapter 78-95, Laws of Florida, amended the disciplinary proceedings section to bring it into compliance with the provisions of chapter 120, Florida Statutes, relating to administrative hearings. Chapter 78-431, Laws of Florida, increased the size of every examining and licensing board within the DPR by one member. The new members were to be appointed by the Governor and were to be lay persons who were not and had not been members of the regulated profession or occupation or any closely related profession or occupation.

* * * *

[50] In the absence of state regulation, there would probably be a certain amount of voluntary self-regulation within the profession. The Florida Institute of CPAs (FICPA) and the American Institute of CPAs (AICPA) have adopted the AICPA Code of Ethics and each has procedures for processing complaints and discipling practitioners who violate the code's provisions. They are also

involved in the preparation and presentation of CPE programs and in programs to improve audit performance within the profession. Membership in these organizations is voluntary, however, and the most severe disciplinary action either can take is suspension or revocation of a practitioner's membership in the organization.

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[*Conclusions and Recommendations*]

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[62] The provisions of the act which prohibit competitive negotiation and solicitation of clients appear to be anti-competitive. It is generally assumed that excluding competition from a market removes a major incentive to deliver quality goods or services at the lowest possible price. If this assumption is true, prohibiting competitive negotiation for auditing engagements and solicitation of clients serves to increase the cost of accounting services.

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[63] 6. Are any facets of the regulatory process designed for the purpose of benefiting, and do they have as their primary effect the benefit of, the regulated entity?

Yes. A number of provisions of the Act may be seen as having as their primary effect, the benefit of the regulated entity.

The prohibition of competitive negotiation in section 473.317, Florida Statutes, appears to be designed primarily to benefit practitioners. It is unclear how permiting CPAs to competitively bid for auditing engagements would compromise the public health, safety, and welfare. CPAs would still be required by the statute to demonstrate their competency prior to becoming licensed, maintain their objectivity and independence, practice in conformance with accepted

standards of accounting and auditing, satisfy CPE requirements, refrain from engaging in prohibited acts, and abide by all the statutory provisions and board rules. The competitive negotiation prohibition does not appear to add any measure of protection for the public not already provided by the above-mentioned provisions.

The prohibition of client solicitation in section 473.323(1)(*b*), Florida Statutes, also appears designed [64] primarily to benefit practitioners. The public is protected by the statute from fraudulent, false, deceptive, or misleading advertising for goods or services (s. 473.323(1)(f), F.S.). In light of that provision, the client solicitation prohibition appears unnecessary for public protection purposes.

The grandfather clause and the provision providing for the licensure of all public accountants as CPAs, both in section 473.325, Florida Statutes, appear designed to benefit members of the profession.

Based upon these conclusions, and the other findings of this report, it is recommended:

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[65] That section 473.317, Florida Statutes, which prohibits competitive bidding for auditing engagements be deleted.

That section 473.323(1)(*b*), Florida Statutes, be amended to prohibit only solicitation of clients in a manner that is false, fraudulent, misleading, or deceptive.

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